













THE LAW  
OF  
LEGAL NECESSITIES  
AND  
OBLIGATIONS

BY

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**TO**  
**THE HON'BLE**  
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Member of the Imperial Legislative Council.**

**THIS BOOK**  
**IS, BY PERMISSION, RESPECTFULLY**

**. DEDICATED.**



## PREFACE.

-: 0 :-

THE subject-matter of this treatise and the method of its treatment in this its first publication demand a few prefatory remarks. The subjects under discussion being vast and complicated a thoroughly scientific and clearly defined classification of the numerous topics was not found possible. For over a decade of my active professional business in the courts in some of the districts in the Central Provinces and in Central India, I collected a mass of materials pertinent to the subject-matter of this book, from the pages of the published law reports of the country. This collection of manuscripts has been arranged under different heads and compiled in the shape of the present treatise.

I have noticed in some detail the gradual development of views in the practical application of the law of Legal Necessities and Obligations respecting the ordinary transactions of Indian families, and traced the same through the ancient texts and later legislations from the early rulings on the subjects. While following this course, I have discussed the connected law of procedure and such other matters as Limitation and Contract, to illustrate as far as possible the complete view of the case-law on the subject. I have, in numerous places, noted the differences and dissents of Courts, and I would make no apology for the boldness with which, at times, I have differed from some of the recent rulings. In these cases I have spared no pains to give the reasons for my differences of opinion. It is needless to mention that such differences on the part of myself as of others following the legal profession are bound by the very nature of things always to exist.



## PREFACE.

Finally, I have no hesitation to admit that there are shortcomings and defects in the present book. These may evoke criticisms and comments ; and I heartily welcome them. For, they will help me eventually to supply the deficiencies, to rearrange the topics wherever deemed necessary, to collect such other views that may not have been noticed, and to make an attempt to bring out a revised and more complete edition of this work in future.

KHANDWA, }  
*July, 1910.* }

HARIDAS CHATTERJEE.

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# THE LAW OF LEGAL NECESSITIES & OBLIGATIONS.

## CHAPTER I.

### INTRODUCTION.

The expression "Legal Necessity" can not be adequately defined: and it is impossible to attempt anything like an exhaustive enumeration of the legal necessities as the expression is used in the various relations and concerns of life which will be considered in this work. I will cite a few selected passages from some of the approved texts. It will appear from them that though the fundamental principles underlying the subject, as recognised by the Courts is the same, it varies considerably in relation to particular persons and relationships: and that it varies also with the condition of the person or of the society from time to time. It is impossible to discuss the subject in an abstract manner. It must be dealt with in concrete cases under all the varying conditions of life and of human affairs. What may be a matter of legal necessity with a widow, say, for the spiritual welfare of her deceased lord, is not so for the mother, daughter, or sister, when these female relations inherit as such the estate of a deceased male. The lists of legal necessities of a father in relation to his son, and vice versa, of a tutor or manager of the joint family, of a guardian, curator, trustee, executor, *Savant*, *Matrulli*, &c. are all materially different from one another. These have been grouped in separate chapters, and considered in detail. But the common principles that overlap the subjects have rendered it necessary

analogically and illustratively, to mix matter in the several chapters with a separate and differentiating treatment of the particular subject under consideration. This has been done throughout the pages of this treatise by the light of the Rulings of Courts collected and focussed together from the scattered pages of the law reports, text-books and the laws in force. The divergences are so great that what may not be a necessity with one may be a strong necessity with another; and what is no necessity with one today may become an urgent and irresistible necessity hereafter. Then, again, what may not be a legal necessity with a backward race or a barbarian may be a pressing necessity with an advanced class of people or a polished individual, and *vice versa*. In this way, therefore, legal necessity is not only a flexible, but it is also essentially a very highly changeful subject. When a nation or a race advances in the march of progress, its wants, as is well-known, multiply: and thus, the scope of its legal necessities and obligations increases. Similarly, if the status of the same family or of an individual in the family changes, —say, from rich to poor, or from poor to rich, the range and the extent of the legal obligations vary. Considerable moral and material changes have been effected; and they are still going on among the Hindus and the Mussalmans of India from the early times of the British rule; and it will be shown in the Chapters that follow that the ever-changing views of the Courts of law proceed *pari passu* with these changes. Whether these changes have been or are for our welfare or not, it is not within the scope of this work to enquire. The *Stradh*, the marriage, the maintenance, the education &c. are the ordinary necessities of a family. But their style and the limit of expenses therefor are commensurate with its wealth and its status. Legal necessity deals with the actual facts that exist: and it has no respect for the bare sentiments or the traditions of the people or of the family. The controvertial questions of customs and usages, the social or the moral agitations of all sorts that go on, the unwritten code of rules that govern the domestic economies of people, are all the extensive debatable grounds, where the principles of legal necessity assert their dominion on one hand, and where its right and sway are, on the other hand, stoutly controverted. The struggles for the solutions of the problems that have arisen, and that will ever continue to arise are evidenced by the

## THE LAW OF LEGAL NECESSITIES AND OBLIGATIONS.

judge-made law of legal necessities in the form of rulings which are all founded on the broad basis of justice, equity and fair play without much help from the prescribed statutes. The expression, Legal Necessity, was originally a judicial coining of the Bench and the Bar. It has never gone, nor will it ever go, on the legislative anvil for being definitely moulded and shaped. The endeavour has ever been to lay down fixed and definite principles. When we come to consider the actual decisions from the very early times till now, we find no doubt many solid points as settled: but there still exist divergences and dissents along the whole course of the parabolic lines of judicial decisions on this subject. In the succeeding Chapters, the settled principles have been given the prominent places; and then the divergences and dissents have been carefully noted and discussed.

Mr. J. D. Mayne, in his well-known and popular work on Hindu Law and Usage always quotes the Privy Council *dictum* in *Hanuman Prasad Pande's* case<sup>1</sup> as containing the principle of legal necessity, in its various aspects and relations, in the nutshell. He never considers it tiresome to repeat the placitum of the ruling which runs as follows:—"The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." But the conditions and safeguards that follow the 'above head-note' are extremely perplexing to the mind when we come to consider each concrete case. Passages, apparently conflicting, are quoted with approval by the contending parties, leaving the Judge almost where he was, and bound to grope, through the dim light of the ruling, to reach the goal of the actual decision on the merits of the case before him. Mr. K. K. Bhattacharya in his *Tagore Law Lectures on Joint Hindu Family* (1884-85), page 489, sums up the subject as follows,—“All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical oblations to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons

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and on special occasions to the relatives,—these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessities. An indigent family may evade meeting them; but to do so lowers the family in the eye of the caste and the kinsfolk. It is difficult to state a general rule for answering the question, whether a given expenditure is a legal necessity or not. To one acquainted with the inner life of Hindu families, it would be at once clear whether any particular instance of family expenditure is proper or not; he would know it instinctively; while no explanation can enable one not so acquainted to find out what are legal necessities, and what are not. Ancestral debts, however, or debts contracted by any one of the family for some common benefit, or to meet some common exigency, are conceded on all hands to be such legal necessities as would justify the alienation of joint property."

Regarding widows, Babu Shyama Charan Sarkar, in his *Vyavastha-Chandrika*, Vol. I, page 132, lays down the following *Vyavastha* or principle (No. 104).

"A widow is competent to give, mortgage or sell her husband's property for such secular purposes as are legally necessary,—*viz.*, for her own subsistence, for payment of revenue and for any act beneficial to the estate; as well as for religious purposes, *viz.*, for payment of her husband's debts, marriage of his daughter, maintenance of those whom he was bound to support, and for securing spiritual welfare by performing religious rites, making pious and charitable gifts and the like." A text of Vyasa contained in the Chapter entitled the *Dan-Dharma* of the *Mahabharata* lays down the following authority: "For women the heritage of their husbands is pronounced applicable to *use*. Let not women on any account *make waste* of their husband's property." Com-

*Waste and use.* mentators have explained that *use* does not mean or include 'wearing delicate apparel and luxuries, but preservation of her person and continuity of life to benefit the deceased, and that useless expenditure, gift, sale and other disposition at her own choice go as *waste* which is prohibited.

It is needless to multiply quotations any further. Besides the father, the coparcener, and the widow, others such as guardians, managers, trustees, executors &c. to whom the subject of legal necessity is a concern, and who are bound by its rules, will have their functions, duties and responsibilities discussed in their respective Chapters. The fundamental heads of legal necessity, with certain variations, are the same in all relationships. But the principles of

General principles of legal necessity applicable in all relations, natural justice and equity have an important part to play in the solutions of complex cases. The particular branch of

litigation governed mainly by the doctrine of legal necessity has no defined code for its safe guidance. The Court relies, in the first instance, on the settled principles of substantive laws of the country; but it feels bound, in a majority of cases, to draw largely and liberally on the traditional law of Obligations which the ancients, Savigny and others related as a branch of the Roman law which has been explained and analysed by commentators,<sup>1</sup> and which has been further developed and elaborated upon by subsequent eminent jurists.<sup>2</sup> We will only quote one passage from Story's Commentaries on Equity Jurisprudence which may be said to lay down the crux of the whole principle. "Thus, it is well-known, that in the

Story on legal necessity. Roman law, as well as in the common law, there are many pacts, or promises of parties (*nudæ pacta*), which produce no legal obligation, capable of enforcement *in foro externo*; but which are left to be disposed of *in foro conscientiae* only. \* \* \*

Obligations in English law. And hence the settled distinction, in that law, between natural obligations, upon which no action lay, but which were merely binding in conscience, and civil obligations which gave origin to actions. The latter were sometimes called just, because of their perfect obligation in a civil sense; the former merely equitable, because of their imperfect obligation."<sup>3</sup>

It will be observed that in addition to the general principles of law and of the rulings under each head of the several Chapters of

1. Vide Archibald Brown's Analysis in 1872 page 2.

2. Vide Sir Henry Maine's Ancient Law 3rd Ed. pp. 322-323 and elsewhere.

3. Vol. I Chap. I § 2 p. 3. Sixth Ed.



this book, the connected matters of Procedure, Limitation, Court Fees, Registration, &c., adjective laws of the country have also been copiously discussed and quoted. It has been found impossible to dispose of the substantive principles involved in the Chapters without due consideration of the underlying principles of the adjective laws considered in the decisions. This has been done to present to the reader a complete and exhaustive view of the subjects dealt with in this treatise. The widows, and the other females, under the various schools of law, have rights peculiar under each system. They may possess exclusive property of their own; or they may derive their rights by inheritance, gift, or bequest. Their powers of disposal for personal needs or under the pressure of legal necessities have been treated in the first instance. Then there are the natural relationships between the father and his son, the *karta* and the coparceners, the managers and their cadets,—all governed by the several schools and branches of law in force in the country. Guardians and their wards come in for discussion in another Chapter. Besides these natural relations, there are certain other “relations resembling those created by contract,” discussed in Chapter V of the Indian Contract Act, IX of 1872. These quasi-contractual obligations as well as the rights and liabilities of direct contracts, *inter partes* which have been dealt with in the laws in force, *viz*, the Contract Act, the Transfer of Property Act, the Trusts Act, the Probate and Administration Act, the Guardian’s Act, &c., give rise to intricate questions of legal necessities and obligations. These have been discussed in their proper places with apposite rulings from early times up to date, not as commentaries of the legal provisions of the aforesaid Acts, but in their bearings on the principles of legal necessities to illustrate what is meant by the phrase as an old and accepted legal phraseology of our Indian Courts.

In one of the concluding Chapters, I have inserted cases of legal necessities and obligations under cases of Trusts, Religious and Charitable Endowments, Executors and Administrators of estates, *Shebaitis* and *Mutwallis*, *gossains*, and others of that nature. These, it is true, are not the common cases of our Muffussil Courts. But they do, nevertheless, crop up, and cause an amount of trouble

for search and for collection of the necessary principles for guidance. The original principles first, and the concurrent, divergent, and dissenting views, next, have been set forth in their proper places, in the respective Chapters for facilities of reference, and for comparison, giving to the reader as complete a view of the matter of his case in hand as possible.

Lastly, I have concluded the work by grouping together, in a General and Miscellaneous Chapter, cases which do not primarily possess such special and technical features as to deserve their insertion elsewhere in the book. They contain, no doubt, illustrative analogies that are always useful for quotations and arguments. Human affairs that have been, and that are usually, set forth in cases are so dissimilar, that every practising lawyer will admit that his quotations make more or less near approach to the facts of his cases. They are seldom identical, so far as the facts go. The quotations in the last general Chapter will, in that view, be found extremely interesting and useful. Then we have to remember the fact, that every compilation of law-book that aims to classify the views of law and of rulings, can do so with reference to the law and the rulings from early times and up to the days of the current legal literature on the subject. But the wide field of litigation, throughout the country, is, and will always continue to remain, open; and instances of cases and of rulings of unprecedented features and peculiarities will always present themselves before the reading public concerned with law for its administration and interpretation. The preceding Chapters of this book have noticed, *first*, the early struggles between the Bench and the Bar to adjust and to arrive at fixed principles for the matters that lay scattered in the chaotic fields of the original and archaic texts, not always reconcilable with one another. And in the *second* place, no pains have been spared to illustrate those principles and their subsequent developments, by apposite rulings that were forged out of the judicial anvil of the country in its full swing. But, as said above, the hammer is going on, and it will go on, unceasingly. Therefore, it became obligatory on me, to append the more recent rulings up to date in the concluding Chapter. It will be found that most of these rulings are corroborative of what has been treated in the earlier Chapters. But

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there have been departures as well. These corroborations and departures have been noticed; and facilities for their references have been inserted in the Index.

It has caused me hard and anxious labour extending over years to get up this book in such a handy manner as to make it useful to the legal profession. Throughout the work, there has been no attempt or pretence for originality. I have seldom ventured to make broad generalizations from particular instances, under the belief that minute changes in the facts of cases render the general deductions inapplicable, and bring them under different principles with different effects. Hints, suggestions, and opinions have, here and there, been hazarded, for the lawyer and the student to pause and to reflect upon. Rulings differentiated or dissented from, as well as rulings which have been followed in some parts and not followed in others, have been prominently discussed in the context, and notes in the Table of Cases have been added to show the differentiations and the dissents. Finally, an elaborate Index has been annexed to the end to facilitate reference and to avoid delay and search. It remains for me to add that I never could possibly expect to make this work come up to that standard of excellence and usefulness which the very difficult and complex subjects discussed in the Chapters require. It would be sufficient for my purposes—and that is the whole reward that I would be glad to accept—if the matters dealt with afford a sort of elementary guide to appreciate and to state tolerably correct views on them, and if this work could claim no other merit than to mitigate, to whatever extent, the trouble of referring to the several sorts of expensive and elaborate law books, texts, and digests that are current in the country.

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## CHAPTER II.

### Widows and other Females.

Following the text of the foregoing Chapter, it will be seen that religious efficacy and the spiritual benefit to the deceased have been accepted and recognized in this country as acts of legal necessity for those on whom these are obligatory under the law. According to Jimuta Vahana, the leading authority of the Bengal school, any expenditure incurred which is useful to the late owner would come within the category of legal necessity and would justify the widow's alienation. "The spiritual welfare of the late owner is here meant, or acts beneficial to the soul of the deceased in the next world."<sup>1</sup> The learned Lecturer on Hindu Widow,—Dr. Trailakya Nath Mitra, quotes Dayabhaga, Chap. XI, Sec. 1, para 61, and proceeds to distinguish from the above precept the cases of extravagant and wasteful expenditures, to which may be added, cases of needless or uncalled-for expenditures in the name of acts beneficial spiritually. Where such extravagance, wastefulness, or needlessness is pleaded, a line has to be drawn between actual necessity and the transgression of its bounds; and upon the determination of this limit, the decision rests for the *pro-tanto* justification of an alienation on the score of legal necessity. Thus, if a female heir is possessed of property left by a deceased male, it is the spiritual benefit conferred on that male which is the guide and the criterion for deciding the question of legal necessity. A Hindu husband, for instance, though morally bound to perform his wife's *svadh*, is not legally bound to do so. But it was said that the daughter need not perform her mother's *svadh*, after her father's death, in order to justify an alienation by her of her father's property for the expenses thereof.<sup>2</sup> This is an early

1. Dr. Mitra, T. L. L. on Hindu Widow (1879) p. 296.

2. Raj Chunder v. Seshhooran 7 W. R., 146

## TO THE LAW OF LEGAL NECESSITIES AND OBLIGATIONS.

Mother's *Sradh* by daughter  
no legal-necessity.

decision of the High Court of Calcutta  
in which the first Indian Judge, Justice  
Shumbhoo Nath Pandit took a part, and

the decision of the Court was delivered by him. The opinion of a Hindu Judge of such eminence deciding in such a way carries weight. But the doctrine of participation in the spiritual benefits arising out of ceremonies which the deceased was morally bound to perform, and which is a valuable guide in the decision of legal necessity, has to some extent been disregarded by this ruling. As a matter of religious principle and practice, throughout Hindustan, an orthodox Hindu feels and recognizes it as his duty to perform the funeral obsequies and the *sradh* of his wife; and to hold that a

Correctness of  
view doubted.

daughter is not authorized to charge her father's estate in order to defray the expenses for her mother's *sradh* is repugnant to the feelings of an

ordinary Hindu. We have it, on the authority of Mr. Justice Dwarkanath Mitter, that if a widow alienates property in order to

*Sradh* by widow of  
her mother-in-law legal  
necessity.

defray the expenses of funeral ceremonies of other members of the family, such as her husband's mother, in the spiritual benefits of

which he would participate, such alienation is good and is supported by legal necessity.<sup>1</sup> The learned Judge went so far as to lay down that the widow's alienation would be valid even if the deceased husband had an elder brother living fit to perform the *sradh*, and the title of the alienee would be indefeasible if he had honestly advanced the money for the purpose.

The reverence for the spiritual welfare to the deceased whose estate is charged for a debt is such that if the debt has been incurred by the widow for the marriage of her husband's predeceased

Marriage of husband's  
predeceased son's daughter.

son's daughter, it is recoverable from the estate in the hand of the reversioner ~~from~~ the widow.<sup>2</sup> In the courts below, presided

over by experienced Hindu Judges, the claim of the creditor was

1. Choudry v. Rasomoyee 11. B. L. R., 418, 10: W. R., 309.

2. Ramcoomar v. Ichhamoi 6 Cal., 36.

See the case of Sakrabhai v. Maganlal 26 Bom., 206 F. B. The reversioner is liable for necessary debt incurred by the widow even without any specific charge on the estate.

disallowed on the ground that as the marriage of a predeceased son's daughter was barely a moral duty of her husband, the widow was under no obligation to have incurred the debt. The High Court ruled that if the girl had not been married "before attaining the age of puberty, spiritual consequences of a most serious kind might be expected, according to Hindu doctrines, to arise both to her deceased father and grandfather." Orthodox traditions have

it that seven successive generations in the ascending order would suffer incalculable spiritual misery if the puberty is attained in the state of maidenhood.<sup>1</sup> Relying on this remote conception of spiritual benefit, the High Court reversed the decision of the courts below. The authorities quoted by the learned pleader of the appellant, Babu Gooroodas Bannerji, (p. 38) may be consulted with advantage. The view of the Bombay High Court in *Umrootram v. Narayandas*<sup>2</sup> was followed inspite of the respondent's contention with quotations of several rulings to the contrary. This ruling has been commented on by several later decisions of High Courts. There have been dissenting views; not on the question of the legal necessity of the transaction, but on the mode of the widow's incurring the debt. For instance, the Madras and the Allahabad High Courts<sup>3</sup> have held that the reversioner would not be bound for the debt if the widow had created no charge for such a debt on the estate in her hand by an alienation in her life time. But in this respect, compare *Devi Dyal v. Bhau Pertap* I. L. R., 31 Cal., 433; and *Sakrabai v. Magan Lal* : I. L. R., 26 Bom., 206. F. B.

In another case,<sup>4</sup> the father on whom the moral and the spiritual duty to provide for the daughter's marriage devolved was not possessed of sufficient means to do so. The greater part of his property was mortgaged, and what remained was barely sufficient for the support of himself and his family. Under these circumstances

१. कदाचित् पितापितृ ज्योतीयात्ता नवेवच ।

अथवा नदत्तं दत्तं दत्तं दत्तं दत्तं ।

१. 2 Borr. (Ed. 1863) p. 201; cited in 1 Morley, 5 Digest's p. 285, No. 39.

३. Rama Sami v. Sellattammal. 4 Mad., 375.

Dhiraj v. Manga 19 All., 300.

४. Kuttam Singh v. Moti Singh. 48 All., 474.

## 12 THE LAW OF LEGAL NECESSITIES AND OBLIGATIONS

Debt by mother for daughter's marriage legal necessity if father is unable to provide for.

the wife, the daughter's mother, mortgaged her own property, that is the property that had come to her from her father, to raise money to meet the expenses of her daughter's marriage. The mortgagee brought an action to enforce the mortgage. Her son, who was her next heir to the estate she had inherited from her father, contested the claim, and urged that his mother had no power to mortgage the property, at any rate, for any period longer than her own life-time, and that there was no legal necessity for the mortgage. On the question of legal necessity it was held that though it was the father's duty to provide for his daughter's marriage, he was unable to do so for want of means. The mother was held to have been justified to charge the estate for the purpose. The plaintiff's claim was decreed. To the same effect is the case of *Vaikuntam v. Kallapiran Ayyangar*

Effect of debts and decrees on the widow's estate and the reversioner.

L. L. R., 23 Mad., p. 512. There, the father died leaving a widow, a marriageable daughter, and a joint brother. The girl's uncle was not keen for her marriage. It was stated that on his refusal, the girl's mother celebrated the marriage; and eventually she sued her brother-in-law, the deceased's joint coparcener, to recover the expenses. Much sophistical argument, following the decisions of the Courts below, was wasted over the question of the necessity of marriage at all in every case, and, at all events, on the uncle's obligation to perform the marriage and to incur the expenses. The case was decided by the High Court in favour of the plaintiff.

Complicated questions arise in relation to the widow's estate and the reversioner's right and interest therein for debts incurred by her in her life-time. The debts may be of legal necessity or only personal. She may die before payment of the debts or decrees passed therefor. It has been held that if the debt is of legal necessity, and a decree is obtained against the widow in her life-time, as representing the estate of her inheritance, the decree binds the estate. In this respect the decisions are of two classes. First, when the decree is executed in her life time; and secondly, when it is sought to be enforced after her death. In the former case, if the debt is her personal obligation, unconnected with legal necessity, on the

face of the proceedings, the execution and sale would convey only her life-interest.<sup>1</sup> It is of course otherwise if the estate is her *stridhan* or separate acquisition, in which case, even after her death, such estate can be followed, both for the purposes of execution as well as for suit, in the hands of reversioners or others. This latter proposition is plain enough, and stands in no need of authorities. But it is at the same time equally correct that if the woman is sued as representing the estate of the deceased male owner (husband, son, or the like), and the suit is so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate and the estate of all those who may come after her, the said interest will pass in execution. Otherwise, the widow's life-interest only and not the rights of the reversioner will pass.<sup>2</sup> It follows, therefore, that an unexecuted personal decree against the widow, or a personal debt due by her would follow the widow to her grave, if she leaves no assets of her own, and if the decree or the debt is unconnected with any ground of recognised legal necessity. A very material difference exists in the views of several High Courts concerning the most important point now under consideration. If the debt is a legal necessity or the

Debt of legal necessity against the widow.

Conflict of views.

decree is founded thereon, and the widow dies before payment, decree, or the execution thereof, as the case may be, is the estate in the hand of the reversioner liable therefor? The Calcutta High Court<sup>3</sup> and an early decision of the High Court of Bombay<sup>4</sup> have answered the question in the affirmative. But the current of authorities in Madras and Allahabad seems to lay down an opposite view.<sup>5</sup> The Allahabad High Court, has

1. Kistomoyee v. Prosunno Narain, 6 W. R., 303.

Sitaram Dey v. Ranee Prosunno, 4 W. R., 38.

Baijhan Dobey v. Brijoo Bhookhan, 24 W. R., 306.

Bistoo Behari v. Lalla Byjnath 16 W. R., 49.

2. Bai Jamna v. Bhai Shankar, 16 Bom., 233.

Narana v. Vasteva 17 Mad., 208.

3. Must. Parbati Bai v. Govinda &c. 2 C. P. L. R., 226.

4. Ram Coomer Mitter v. Ichamoyee Dosee 6 Cal., 36.

5. Umrootran v. Narayundas 3 Borr. p. 201 cited in Morley's Digest, p. 285.

6. Dhiraj v. Mangaram, 19 All., 300.

Ramassami v. Sellattammal 4 Mad., 375.

Shiamanand v. Harial 18 All., 471.

But See Hurry Mohan v. Gonesli 10 Cal., 823 F. R.



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put it too strongly by holding that the reversioner's estate is in no way liable even if the debt was for legal necessity. The principle suggested is that after the widow's death, the debts contracted by her will not follow the estate she vacates ~~where~~ there had been a charge created by her while alive. This is plain enough, and need not have been said. But the reasons for dissenting from the view of the Calcutta High Court are not sound: and apparently the Full Bench Ruling of Calcutta reported in the Xth volume was not referred to. It would be against the principles of equity and reason to hold that the reversioner and his estate are not liable if the debt was under the pressure of valid legal necessity. In that view, it is hardly possible to support what another Bombay case lays down in a similar case.<sup>1</sup> That the money had been borrowed by the widow for the preservation of the estate appears to have been admitted: and it has been acknowledged by the High Court that "it is hard that the plaintiff should lose his money" by the bare fact of the adoption by the deceased widow. It was held that the defendant was morally bound, and not legally, for the debt; and that it was so simply because the widow had not secured the debt by a mortgage or any charge on the estate while alive. Why there should be any difference in principle, if the debt be founded on legal necessity, between a secured and unsecured debt, so far as the next reversioner is concerned, it is hard to see. We are perfectly at liberty in the face of the conflict of views among the High Courts on the subject, to accept the sounder principle laid down in the Calcutta cases noted above. In a subsequent decision<sup>2</sup> of the Bombay High Court, the afore-said fanciful distinction appears to have been supported.

When a proper case is made out by the pleadings, there can be no distinction in principle, whether the debt of necessity incurred by the widow was secured or not. In a later decision<sup>3</sup> by the Calcutta High Court, the learned Judges lay down "that the widow's alienation for the purpose of paying the revenue becomes binding on the reversioner only when there is necessity made out for the alienation. But where the widow only neglects to pay the

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1. *Gudgeppa v. Apaji* 3 Bom , 237 (p. 240).

2. *Murari v. Tayana* 20 B. 286.

3. *Upendra v. Gindra* 25 C. 565.

revenue, and some body else pays it for her, it can not be said that the default.....was due to the necessities of the estate. It may be that she had funds in her hands out of which to make the payment, and yet she did not.....In such a case, the persons who ought to be held liable would be, not the reversionary heirs to her husband's estate, but the persons who would inherit her *stridhan*." That may be perfectly correct. But the point is what if the debt contracted by the late widow, whether secured or not, had the sanction of pressing legal necessity? The widow fully represents the estate while alive, just as much as the male owner did; but subject only to one reservation: and that is, there is the contingent, not vested,

Widow fully represents the estate.

interest-holder who in her life-time is called the reversioner. The question of an alienation by her is different. Because, if she creates a mortgage or a charge for a debt of valid legal necessity, the creditor or the mortgagee can, in a properly representative action, so formulate his suit as to bind the whole estate, including the future reversionary interest, in such a manner as to prevent the possibility of risk or

Reversioner's interest  
Sec. 85 Act IV of 1882

the chance of subsequent litigation by the reversioner after her death. Section 85 of the Transfer of Property Act lends support to this view. Ordinarily speaking, the usual mortgage or foreclosure suit may be said to be confined within the narrow limits of the widow's life-time. It is always in the power of the reversioner, both when the widow is alive or she is dead, to impugn the transaction to save his contingent or vested interest. There is nothing in Sec. 85 of the Transfer of Property Act to indicate that the reversionary interest is not included within the meaning of the term, "interest" used in the Section. No one ever takes a mortgage, a sale, or an encumbrance of any sort from a female heir with the idea or consciousness that only the life-interest is meant or intended to be dealt. If the advance is *bona fide* and made with circumspection and prudence, with strict adherence to the conditions of legal necessities, there is absolutely no reason why the Court would prevent his getting the full remedy anticipating and avoiding the prospective risks. Dr.

Dr. R. B. Ghosh  
on do.

Rash Behari Ghosh,—See his Law of Mortgage, Third Edition, page 689, suggests that the reversioners should be added as parties if the

mortgagee wants to bind the husband's estate.<sup>1</sup> It follows, therefore, that a personal obligation or a debt incurred by the deceased widow, if the same be founded on legal necessity, can be enforced on the estate in the hand of the reversioner, if the pleadings and the evidence be correctly made out. The bond evidencing such a debt need not necessarily be consigned to the funeral pile of the deceased lady. If in the result of such a representative action, no case of legal necessity is made out, the creditor and the next reversioner for the time being, who legally represents the estate in reversion, so as to bind the reversion for ever, and who is impleaded as a party under the mandatory provisions of Sec. 85 of the Transfer of Property

Act, will precisely realize their respective positions. In other words, the mortgagee decree-holder will be told expressly by the terms of his decree that he was going to foreclose or to bring to sale only the life-interest of the widow; and the reversioner-party will anticipate his possession of the property as owner without the encumbrance in suit. If this view of law be correct, the creditor taking a sale, a mortgage, or an encumbrance of any sort from a Hindu widow in respect of her estate will be doubly cautious to be well-fortified and on his guard as regards his advance to the widow. He would see more carefully than ever that his loan to the lady was justified on the ground of strict legal necessity, unless he meant or intended 'to deal with the widow's estate *as such*. Another great advantage of the procedure suggested would be the comparative freshness of the transaction and of the evidence bearing on the subject. If, in spite of the permissive legal provision,—really the Courts, particularly the High Court of Allahabad, have ruled it to be an obligatory provision of law, (Sec. 85 Act IV of 1884,) the reversioner of the time being is lost out of sight and not impleaded in the action, and the enquiry into the matter of legal necessity is deferred till the widow dies, after the evidence has materially disappeared or become dimmed, the game of the litigation against the widow alone, is not, at times, worth the candle. And yet this is the ordinary procedure in such cases although nearly

1. Nagender v. Kamini 8 W. R., 17.

Mohima v. Ram 23 W. R., 174.

Srinath v. Hari 3 C. W. N., 637.

quarter of a century has elapsed since the passing of the Transfer of Property Act.

A leading case on the above subject is the Privy Council Ruling in *Kameswar v. Run Bahadur* I. L. R., 6 Cal., 458. The debt due to a creditor by a widow, secured or unsecured, is governed, says the above decision, by the principles of *Hanuman Pande's* case, which is the case of a guardian in relation to the minor proprietor; and the same rule, it is said, applies to the transactions of a Mitakshara father in relation to the ancestral estate in his hand, where-in his sons have a vested interest by birth. The widow executed a mortgage in 1872. The reversioner was impleaded as a co-defendant on account of an *Ekrarnama* he executed to stand responsible for her just debts. Thus the suit proceeded, as if it were framed under Section 85 of the Transfer of Property Act,—the point that I have just touched upon. The main question in the suit turned upon the legal necessity for the loan; and it was decided in the negative in the High Court when the widow was alive. The result was a personal decree against her with costs. The creditor appealed to the Privy Council to re-agitate, in vain, the point of legal necessity for the loan involved in the suit. The appeal was dismissed: and the subsequent attempt on the part of the decree-holder for money against the reversioner did not prevail;<sup>1</sup> as it was held that the latter was not her legal representative within the meaning of Section 234 C. P. C.;—because he held assets, not of the widow, but of the deceased male owner.

Regarding the question of the debt or decree following the estate in the hand of the next-taker thereof after the death of the widow, their Lordships of the Privy Council made the following remarks. "It appears to their Lordships that, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit, is bound at least to show the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of

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<sup>1</sup> *Kameswar v. Run Bahadur* 12 Cal., 458.

the recognized necessities"—I. L. R. 6 Cal., 843 (p. 848 para 2). Very

practical and instructive hints as to when, why,  
 Loan by widow and how the widow should borrow money or  
 necessary? not are contained in the same page of the

report. It is not enough if an amateur friend or an over-zealous dependent, relation or servant should come and dun into the ears of the sowcar the necessities for the loan, but the responsible gomastha in charge of the books and management of the estate should convince the conscience of the lender of money as regards its pressing necessity. In the case before the Privy Council, there was *prima facie* want of necessity; as the lady's income was Rs. 1,30,000 a year; and the case was not of a temporary loan followed by the sudden death of the widow. But if the judgment—debt into which the deceased widow had been cast, was one which she had incurred in her attempt to save her husband's estate, the reversioner would be liable.<sup>1</sup> It has been printed out in one of the decisions quoted that Judges would do well to insert in the decree whether the same is personal against the widow, or against her as representing the estate or charging the same. It is therefore no less necessary that the bond or the pleadings for the recovery of the debt should set forth its binding character on the estate. If substantially, and on the basis of real facts, the Judge finds, even in second appeal, that the debt was of a binding nature, effect would be given to it, though on the surface of the transaction the name of the widow, or the widow mother of a minor proprietor, appears to meet the eye.<sup>2</sup> A Hindu died leaving debts. His widow being in need of money to pay the Government revenue borrowed more money and passed a mortgage for the consolidated debt. In pursuance of a will left by her deceased husband she adopted a son. One year after the adoption, the widow was sued in her own name alone, resulting in a compromise decree. It was held<sup>3</sup> on the evidence and consideration of the

1 Ram Kishore v. Kally Kanto 6 Cal. 479. Mohim v. Ram Kishore 15 B. L. R. 142. Premmoyi v. Preonath 23 Cal. 636.

2 Hari Saran v. Bhubaneswari 16 Cal. 40 P. C. Kedar v. Protap 20 Cal. 11, Walian v. Banke Behari 30 Cal., 1021 P. C.

3 Norendra v. Bhupendra 23 Cal. 374. Vasudev v. Krishnaji 20 Bpm. 534.

merits of the case that the decree was not a personal one against the widow, but that the adopted son and his estate were liable.

The principle deducible from the aforesaid authorities is what accords with the sounder view on the subject of the deceased widow's debts stated in the preceding pages. In his learned work <sup>1</sup> on Hindu Law, Babu Golap Chandra Sastri disagrees with the view of the Allahabad High Court in I. L. R., 19 All., 300; and, adhering to the sounder view of the Bengal High Court, says that the lawful debts, secured, unsecured or parol, contracted by the widow are on the same level as if the debts were owing by her deceased husband; because the fundamental theory of the Hindu widowhood is that her husband lives in her. This, says the learned author, is the foundation of the reversioner's right. Because it is the reversioner living at the time of the widow's death that inherits the estate. In theory the last male owner dies with his widow.

Though expenditure for spiritual and religious uses is classed among the category of legal necessities justifying alienation, cases of extravagance and wastefulness, in the name or for the sake of spiritual benefit, must be always distinguished. Where such is the plea, a line must be drawn between actual legal necessity and the transgression of its limits, and the determination of this limit is the precise line for decision for the *protanto* justification of the alienation. It is true that the Privy Council, in *Collector of Muslipattam v. Cavalay Venkata*, 8 M. L. A. p. 550, has laid it down that "for religious and charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, the widow has a larger power of disposition than that which she possesses for purely worldly purposes." The principle herein laid down is the recognition by the supreme judicial authority in the land of the importance of religious efficacy. The principle undoubtedly commends itself to a Hindu mind, and is in consonance with the *Sastras*. But in common practice it is impossible to follow the doctrine to the extent of the fullest justification of all

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1, A. Treatise on Hindu Law by Golap Chandra Sastri M. A. B. L. 3rd Ed. 1907, pp. 403-07.

practical transactions. In a case before the High Court of Calcutta,<sup>1</sup> the finding was that all the estate belonged to the late husband, and that a full one third of the estate inherited was alienated and dedicated to the idol by the widow.

Religious & charitable grants & dedications, legal necessity.

This alienation had not the support of the requisite religious ground for two reasons.

First, because the religious establishment was not the making of the widow's late husband; and secondly, even if it had been so, the alienation was excessive in reference to the custom and the authorities that exist. For these two grounds, the alienation was annulled entirely. It would, of course, be otherwise if the last male owner had authorized the widow to make the dedication of his estate to the services of an idol. It would then be regarded in the light of his own act in the disposal of his own properties. If the widow were to act in the strict conformity with the wishes of the late full owner, and to dedicate in part or in whole the estate in her hand in accordance with the said wishes, the reversioner, it is apprehended, will not be permitted to question the transaction after her death. In one case,<sup>2</sup> the alienation to the idol was annulled on the ground that there was no idol in existence at the time of the husband's bequest. The idol, as the deity, is no doubt always in existence in contemplation of law and in accordance with the religious instincts. But a particular idol, as the juridical person, must be in existence at the time of the gift or bequest in order to be capable of taking. In the above case, the bequest having been avoided for uncertainty, an estate of intestacy followed, and the widow's dedication was not allowed to prevail because she had adopted a son with her husband's authority. It is a long established principle that a general devise in *Dharam* is void for vagueness and uncertainty.<sup>3</sup> The rightful owner, whenever his title accrues to the estate, recovers the same by annulling the grant. In a case<sup>4</sup> before the Bombay High Court, one Cullianjee Sewjee, a man of estate, made a declaration in his will that, with the

1. *Ram Kawal &c. v. Ram Kishore Das &c.* 22 Cal., 306.

2. *Upendra Lal v. Hem Chundra* 25 Cal. 405.

3. *Advocate general v. Damothar-Perry*, O.E. C. 526; followed in *Fransjiban Deokuvor* 1 Bom. H. C. R. 76.

4. *Vandravandas v. Chisondas* 21 Bom 646.

exception of some properties which he had left for the benefit of his widows, the trustees and executors were at liberty to apply the bulk of his remaining estate to charity (*Dharam*). The bequest was made in 1869. The widows survived him, one after another, up to 1888. The reversioner brought an action after their death to recover the estate left by the widows as well as the residue, and contended that as regards the latter it was a case of intestacy,—the bequest being void for vagueness and indefiniteness. The question of legal necessity did not arise; as the widows were not entitled to perpetuate a void transaction. It would obviously make no difference if such vague and indefinite grants were made by the widow herself or by her with the authority of the deceased male owner. The several Indian cases,<sup>1</sup> quoted at the time of the argument were distinguished from the English decisions on the subject, on the ground, that the charitable or the religious bequests in those cases were specific, defined, and precise. The reversioner's claim was thus decreed. This decision, it may be remarked, leaves untouched the broad question that religious and charitable grants by the widow for her own or for the late owner's spiritual welfare,—when the grant is reasonable with reference to the estate in her possession—may be upheld on the ground of strict legal necessity. What grant is reasonable is always a question of fact with reference to the nature of the estate and of the grant. There is sufficient indication, of the deference which the Judges feel for the religious and charitable instincts of the people of this country and for their benevolence in the decision of the Bombay case just cited, (Vide pages 665 & 666), to ground the belief that if in strict pursuance of the wishes of the late owner, the widow were to perform a meritorious act of grant, the court will not readily annul the transaction at the instance of the reversioner. Reasonable grants of her own would for the same reason be supported on the ground of legal necessity.

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<sup>1</sup> *Gangabai v. Thayer Mulla* 1 Bom. H. C. Rep. 71; *Jamnabai v. Khimje* 14 Bom. 1; *Dwarkan v. Burieda* 4 Cal., 443; *Lakshmi v. Vajjunath* 6 Bom., 24.



It follows from the above and the authorities cited below that with reference to the property in the possession of any female heir, the spiritual welfare of the late owner of the estate is the sole guide. The benefit to any other person than the late owner is excluded from the list of legal necessities. Though under the Hindu Law theory, the existence of the widow is the prolongation of her deceased husband's life, yet, the spiritual welfare of her own soul or the temporal benefit of high merit to herself is always distinguished from the list of legal necessities.<sup>1</sup> Mr. J. D. Mayne in his valuable work on Hindu Law points out the distinction

Spiritual benefit to the late owner & to none else, legal necessity. between absolute necessities and acts of the nature of spiritual luxuries. The latter are excluded, in a qualified sense, from the list of legal necessities, such as, holy pilgrimages for her own sake and her own charities. "For these, it would appear that she may dispose of a part of the estate, but that the expense which is allowable must be limited with a due regard to the entire bulk of the property, and may even be totally inadmissible, where it is not warranted by the circumstances of the family."<sup>2</sup> The widow being, in the abstract spiritual aspect of the question, an identity in soul with, and a continuity in life of, her deceased lord, it is difficult to say precisely that a particular religious and charitable act on her part is for *her* spiritual welfare as distinguished from that of her husband. The case of *Gaya Sradh* in 19 W. R., p. 426, quoted above, is in point. The court held, that the performance by the widow of her husband's *Sradh* at Gaya, is a reasonable necessity for which she may alienate a portion of his estate. It can not, however, be doubted, as suggested by

1. *Rama v. Ranga* 8 Mad. 552.—Pilgrimages and sacrifices are meritorious but optional with the widow.

*Lakshinaraina v. Dasu* : 11 Mad. 288.—Husband's *sradh* is necessity : grant of a bit of land by the widow in possession of a rich estate is supportable.

*Ram Kawai v. Ram* 22 Cal. 506.—Alienation by widow to perpetuate an endowment is spiritual luxury crimed for her own welfare.

2. *Huromohan v. Alukmonee* 1 W. R. 252. *Asruf v. Brojesuri* 19 W. R. 426. *Muteeram v. Gopal* 20 W. R. 187. *Purandai v. Jainarain* 4 All. 482. If property be small, pilgrimage or charity gift to priest is improper. But in those early days *Gaya Sradh* for the spiritual welfare of the deceased husband used partially to be supported if there was decent estate in hand.

Optional  
ceremonies.

their lordships, that the performance of the *Gaya Sradh* is an *optional* ceremony which the widow may or may not perform. Such being the case, the correctness of the view of law justifying the alienation of property in the

View of 19 W. R.  
426 doubted.

case in question, has been questioned by Dr. Mitra (T. L. L. 1879 page 312 para 2) whose observations here deserve quotation:—"If it is once admitted that the ceremony is optional, the performance of it will be no ground for incurring debts encumbering the estate or for alienating the same. The reversioner will say that as the ceremony is optional, if there are sufficient means from the current income, let the widow perform it; otherwise, let her leave it unperformed and not touch the *corpus* of the estate for the purpose of performing the same. I think, by treating this ceremony only as a *necessary* one which the widow is bound to perform, that an alienation on account of it can be justified."

Spiritual luxuries  
and optional cere-  
monies permissible  
when.

The tendency of more recent authorities, judicial decisions and commentaries, is an attempt to reconcile the current religious views of the Hindus with the more practical tendency of modern times to preserve the estate from the whims, caprices, and the extravagances of the female heirs who are very easily led away, in point of expenses, from the course of strict rational expenditures. Suitable gifts for the benefit of the late owner's soul (I. L. R. 4 All, 482), sale or mortgage of a small portion of the estate bearing a reasonable proportion to the entire inheritance for cash that is immediately needed (I. L. R. 8 Mad., 552), expenditures for reasonable charitable purposes,—such as, building of temples, digging of tanks, education, dispensary or the like,—reasonable in view of the actual requirements and the nature of the estate, expenses to a limited extent by way of gifts to Brahmins or to idols, reasonable expenditures commensurate with the income for the necessary *sradhs* which the last owner was *bound* to perform, would, it seems, be supported. The exact limit or proportion it is impossible to define precisely. That will depend on the merits of each case and on the discretion of the judge of law and facts. But the conclusion seems irresistible that under the existing authorities, a line

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must be drawn to distinguish the *optional* from the *compulsory* acts of spiritual welfare and benefit. They have all the sanction of orthodox law, and are classed under the head of legal necessities.

But it can no longer be doubted that if there be no immediate or pressing need

Necessary ceremonies  
strict legal necessities

for a particular meritorious act; or, in other words, if it be optional, the widow or any other female heir may perform it from the current income and the accumulations, with respect to which, as will be shown later on, she has a more extensive dominion and a larger power of disposal. But she will not, it seems, be permitted to squander away *corpus*, of the estate, or any part thereof, which she has inherited. The

Optional  
not so

following is an important summary of the principles laid down with authorities and quotations by a learned Hindu lawyer.<sup>1</sup>

"105. Without the consent of her husband's reversioners, a widow is however, competent to sell so much and no more, of his property as may be required for the performance of the indispensable duties (*nitya-karma*). If such acts can not be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties *must* be performed. But for the performance of an optional religious act (*hamya-karma*), she may, without their consent, dispose of only a small portion of the estate.

"106. If, however, the expenses of those acts including maintenance could possibly be defrayed with the accumulated wealth, or with the income of the estate, left by the deceased, then his widow can not sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purposes. Further.—

Accumulation  
and income.

"107. If the reversioners supply, or agree to supply, to the widow, expenses for her subsistence and performance of religious acts, in that case, also, the widow can not sell any portion of the estate."

The question of quantity and propriety may very reasonably be contested to demand consideration and decision.

There can, of course, be no middle course in cases of established facts. No equities can arise in extreme cases. In general, where a conflict arises between the reversioner and the alienee of the heiress, the question is simply whether her alienation was for a lawful and necessary purpose or not. If it was, it binds him, if not, it does not bind him. But in ordinary human transactions the facts are not so elementary : they are not so easy and plain-sailing in the generality of cases. The heir or the reversioner pulls one way,—and the alienee in the opposite direction ; and complications necessarily arise. If in the result of this conflict, the facts show that a larger portion of the estate than was necessary has been sold, the court of law and equity would perhaps set aside the sale conditionally, that, is, subject to the payment, by the heir or reversioner, of the necessary amount which was received with interest less the income derived.<sup>1</sup> This would be treating the sale as

if it were a mortgage. But in no case will the reversioner or the heir be permitted to convert a sale to a mortgage, if the sale had been for valid and undoubted legal necessity.<sup>2</sup> In

an early decision, reported in 4 B. L. R. H. C., 118-125, it was found that the deed was executed upon a loan of money part of which was properly borrowed for reasons of legal necessity, while the remainder was not. The Principal

Sudder Ameen considered that the deed of sale was valid in part and void as to rest, and decreed accordingly. Sir Barnes Peacock C. J., doubted the soundness of this principle, and stated the correct and reasonable course to be, when the defendant establishes the necessity of a part of the loan, to avoid the deed altogether, the plaintiff recovering possession upon his paying the amount which was legally taken up for necessary purposes recognized by law. On the question, then, whether a part of the alienation in proportion to the extent of legal necessity can be upheld, the opinion expressed by

<sup>1</sup> *Phool Chand v. Rughooy W. R.*, 108.

*Gowlad v. Baldeo*. 25 All., 230.

<sup>2</sup> *Deendyal &c. v. Ram Coomarr* 9 W. R., 184.

Sir B. Peacock, C. J., though it was an *obiter* in the case quoted above seems to have been followed ever since in practice,<sup>1</sup> up to the Privy Council. In *re Babu Luchmedher Sing v. Ekbal Ali* 8 W. R., 75, Macpherson J. lays down, "with respect to joint property, a principle somewhat analogous to the above. He says that only so

much of the property should be sold as will meet the legal necessity; if a larger portion than is required is sold, it must be shown by the purchaser

Do in joint family property.

that the money required to pay off the claim could not be otherwise raised. Where, however, the excess is comparatively small, the above rule will not perhaps apply. If the rule for *pro tanto* cancellation be followed in practice, the difficulty will always lie in drawing the line. In extreme cases, however, where the legal necessity is almost fully established for the alienation, a court of equity might retain the alienation unrevoked, making the alienee to compensate the claimant in money. But in the majority of cases, that is, cases of inadequacy of legal necessity, or where money could be easily raised otherwise, the transaction will be set aside with an

equitable award of refund. In this connection the following observations, of Mahmood J. in *Makundi v. Sarabsukh* I. L. R. VI Allahabad page 417 (p. 422) are worthy of consideration :—

Equitable refund.

" The finding of the Lower Appellate Court is that the money was needed and taken possibly to defray the plaintiff's marriage expenses, but certainly for his support and necessary expenses. But this circumstance in itself, as we have already observed, would not justify an obviously imprudent and reckless sale; and we hold that the deed of sale executed by Raj Koer on the 13 November 1874, cannot stand. At the same time, if it is true, that any portion of the purchase money was spent upon the maintenance or marriage of the plaintiff, we are of opinion, that the defendant respondent is entitled to be recouped by the plaintiff to the extent of the money appropriated to the latter's benefit. This is a rule of equity which

<sup>1</sup> *Koer Hasmat Rai v. Sunderdas &c.* 11 Cal., 396.

Do of minor's estate  
by Guardians, has been recognized by the Courts of India when setting aside illegal sales by guardians of minors<sup>1</sup>; and, applying the rule to the present case, we hold that the plaintiff is bound \* \* \* to allow a deduction in favour of the defendant to the extent above indicated."

The case was then remanded with direction to make the necessary enquiries and for disposal. It was not perhaps quite correct to say, as will be found in the above quotation, that the aforesaid rule has been recognized by the courts in India when setting aside *illegal* sales by guardians of minors. Such sales are void *ab initio*. What is obviously meant is to indicate the rule to be observed in cases of partial benefit, or partial necessity. But it cannot be doubted that the rule applies equally whether the guardian of minor or a widow happens to make the alienation.

The question of legal necessity *at the time of the transaction* is very closely scrutinized by our courts of law. The burden of proof lies always on the party who wishes to rely on the alienation. In *Amarnath v. Achan Kuar*, I. L. R. 14. Allahabad., page 420. P. C., the only issue was as to the "absence of necessity to take the loan." The Subordinate Judge decreed the claim of the alienee, holding, that the plea of want of necessity was not made out, apparently, relying on the recitals in the mortgage-bond. The High Court reversed the decision after giving to the plaintiff a fresh opportunity to prove his case by evidence. The sole ground on which the Privy Council upheld the decision of the High Court was the entire failure of the plaintiff to discharge the burden of proof which lay on him. The decision of *Hanuman Prasad Pande vs. Munraj Koonwaree* 6 M. I. A., 393 was relied upon as the direct authority on the question of *onus*. It sometimes happens that a Hindu male proprietor dies leaving a set of women and widows

<sup>1</sup> *Paran v. Karunamayi*, 7 B. L. R., 90.

*Baikesar v. Baiganga* 8. Bom. H. C. Rep, A. C. J, 31.

*Kuvarjee v. Moti* 3 Bom. 234.

*Gadgeppa v. Apajee* 3 B.m. 237.

A family of widows and women. Legal necessity; Limitation, *Resjudicata*, partial necessity.

only. One Bisheswar<sup>1</sup> died leaving two widows, a mother and a daughter. Such a family seldom live in harmony and in joint messing. A short time after the death of Bisheswar, the childless widow sold her undefined and undivided interest. Thereupon the co-widow sued to set aside the sale. The suit was not successful. The reason thereof is not stated in the report. But the litigation resulted in the severance of the shares of the lady-coparceners, if I may so describe them. By the decree, a 4 annas share was assigned to the mother;  $5\frac{1}{2}$  annas share was given to each of the widows; and the daughter got one anna. All this took place in 1859. Within next twenty-five years, the mother died. Her 4 annas share was taken in equal halves by her two daughters-in-law. In 1886, the same widow sold her two annas interest received from her mother-in law to the original vendees of her  $5\frac{1}{2}$  annas interest. The two sales took place at an interval of 27 years nearly. After the death of her mother and step-mother, the daughter sued to recover the estate from the alienee on the ground that the sales in 1859 and 1886 were invalid and were not supported by legal necessity. The defences primarily were three. First, the claim was barred by limitation. Secondly, the claim as regards the sale of 1859 was barred as *res judicata* by reason of the litigation by the plaintiff's mother in 1859; and thirdly, the sales were necessary and therefore valid and good. As regards limitation, it was held that the plaintiff's right to sue did not arise until the death of her mothers, and her suit was brought within 12 years of the date of the death of the survivor. In this opinion, the Court was supported by the decision in *Jhamman v. Tisohi*, I. L. R. 25 All., 435, in which the authorities on the question were fully considered. Regarding the plea founded on the previous litigation, it was held briefly and summarily that "nothing took place in the previous suit to prevent the plaintiff maintaining her claim to the share" of  $5\frac{1}{2}$  annas sold in 1859. Why not, it is not explained nor discussed. Presumably, the previous suit by one widow against the co-widow and her alienee to cancel the alienation, and to recover the estate in

<sup>1</sup> Ram Del v. Abu Jafar 27 All., 494.

Sale by a co-widow  
of her share nullity.

the joint coparcenary interest of two co-widows completely representing the inheritance for the time being, was a representative action.

Apparently the ground of action was that the alienation was effected without the plaintiff's consent, and it was invalid for want of consent and also for want of legal necessity. Dismissal of such a claim was, on the *prima facie* view of the matter, a bar to the fresh suit by the plaintiff's daughter for the same relief and for the same reason, after more than quarter of a century. The mother's death, that is, the termination of the widow's interest let in, it is true, the daughter's right to succeed to her father's estate, entitling her to treat the period of her mother's life time, however long, a sort of blank or suspense of her full rights, and to ignore and to repudiate her improper and unauthorized alienations. But if the widow herself had chosen to litigate for the cancellation of a void transaction and failed, it would be, to say the least of it, trifling with the settled principle of the memorable *Shivaganga* case, if it be quietly conceded as the learned Judges of the Allahabad High Court have done in I. L. R. 27 All., 494 (p. 496), by simply stating, "nothing took place in the previous suit to prevent the plaintiff maintaining her claim to that share. Ram Kali could, as to that share, have no higher interest than that of a Hindu widow. But she might still give a good title to the vendee if the sale was executed in lieu of proper consideration and on account of legal necessity." The learned Judges should have rather held, it is most respectfully submitted, that neither "proper consideration," nor "legal necessity" was a point of available defence in the suit of the co-widow, Mussammat Ram Kali, to recover the estate from the hands of the person who took the alienation from the co-widow, Mustt Ram Jhari, without the consent of the former. This being the settled principle of law laid down by the Privy Council, and followed by numerous rulings by the Courts of India,<sup>1</sup> it should, I think, have been pointed out that notwithstanding the result of the litigation in 1859, the co-widow's alienation remained *ipso facto* invalid and an abortive transaction till the death of the surviving widow. "The right of survivorship, says Dr. Mitra,<sup>2</sup> (between and among

<sup>1</sup> Bhagwandeon Debi v. Myanabai 9 W, R. 23 P. C.

<sup>2</sup> His Tagore Law Lectures page 276



co-widows and co-women generally) "is so strong that the survivor takes the whole property to the exclusion of the daughters of the deceased widow. They are, therefore, in the strictest sense, coparceners; and between undivided coparceners, there can be no alienation by one without the consent of the other. Even with such consent, one widow can not alienate her share so as to convey a good title in the absence of legal necessity."

To the same effect is the devolution of property between two sisters <sup>1</sup> *inter Se*. There can be no estoppel by reason of an amicable partition arrangement among the several sisters jointly inheriting from a deceased male. It is not in the power of any of them to make a valid alienation to the prejudice of the others' right of survivorship. <sup>2</sup> A junior widow without the consent of her senior granted a long lease of the property to a person. <sup>3</sup> There was an adverse mutation order against the senior widow; and it was pleaded that the possession of the junior widow and of her lessee remained adverse for over 12 years. But after the death of the junior widow, the right to reclaim the land demised prevailed.

In the Allahabad case, I. L. R. 27 All., 494, considered above, the Court of First Appeal returned a finding to the High Court that the sales by the co-widow had the support of legal necessity. But the High Court scrutinized the facts on foot of which the existence of legal necessity was deduced. The items that went for repayment of the deceased's debts were accepted as valid and necessary to justify the alienation *pro tanto* of the widow's share. The expenses for charity and pilgrimage to Gaya were eliminated as needless expenditures. Thus the High Court reduced the amount of the equitable refund from what was found as the consideration of legal necessity by the Lower Appellate Court. The result of the case was then worthy of note. The alienation of one widow, without the consent of the co-widow, for the purposes of legal necessity

Do for Sisters  
& other females.

Legal necessity, mixed  
question, Law and Fact.

Co-widows, copar-  
cenary, alienation by  
one, Legal necessity.

<sup>1</sup> Mt Khulroo v. Saraswati 5 C. P. L. R. 58.

<sup>2</sup> Mt Chander v. Murat 7 C. P. L. R. 153.

<sup>3</sup> Ganesh v. Imrat Lal 8. C. P. L. R. 99.

was upheld to the extent that was justified by the necessity. If we take the estate of the co-widows in the light of a coparcenary property with strong and indefeasible right of survivorship, as laid down by the authorities ; and if we further accept, as an established principle, that its character as a coparcenary estate is not destroyed by an amicable partition effected for mutual peaceful enjoyment, then we have to admit that the tie of survivorship between and among female co-heiresses is stronger than what exists in the Mitakshara male coparcenary. Because two co-widows can not so completely sever their interests one from another, as to make it a divided estate in the ordinary sense of the expression. It is discretionary with the Court to order a partition at the suit of one widow against another.<sup>1</sup> So that if a partition is brought about by way of mutual agreement or by suit, the right of survivorship, as in the case of male coparceners, after division, is not gone. The surviving divided widow,—and not the next successor of the deceased male, gets the share of the deceased co-widow. If this be the correct deduction from the authorities that exist, it is a question of very serious importance whether the title of an alienee from a co-widow is safe, if the alienation is effected without the consent or perhaps in defiance of the protests of the other widow, even if there be a ground of recognized legal necessity to justify the alienation. I have not been able to find a precise decision on the subject. I will not therefore hazard my own view ; but I will barely content myself by observing that much will depend on the facts of the case : and if a strong equitable ground is made out, there is no reason why the Court will not follow the *obiter* stated above, and support the alienation that may be brought about under the pressure of strong and inevitable legal necessity.

A Hindu widow has full right to alienate a portion of the estate in her possession, if the benefit to her husband's soul renders the alienation necessary, and even if the beneficial act could be, but is not, performed by another male member.

Husband's mother's  
*Sradh*.

In one case,<sup>2</sup> the *Sradh* of the mother-in-law was the duty that fell on the widow. The court upheld her action as meritorious and necessary, and beneficial

<sup>1</sup> Soudaminy v. Jogesh Dutt, 2 Cal, 262.

<sup>2</sup> Choudhry Junmejoy v. Rasmoyee 10 W. R. 309.

to the soul of her husband. It has been held, in a *Musstt* case, that a Hindu widow is not justified to make a gift of valuable immovable property to the Brahmin priest for the performance by him of the usual exequial rites. The usual fees paid and received were deemed to have been adequate remuneration. Jagannath in his comments on the text of Narada (See Colebrook's

Payment of  
Husband's debts.

Translation, Digest Vol I. pp. 315, 316) says, "If the assets of the husband have been received by the wife, she must pay the debts." And again, "and so must a debt be paid by a childless widow who has accepted the care of the assets, even though she have not accepted the burden of the debts for she is the successor to the estate." Hence it follows that a Hindu widow can alienate lands to pay her husband's debts without the consent of heirs; and even sale is valid to meet the purposes. *Musstt Oma v. Musstt Indramani*. Sel. Sud. D. A. R. Vol. VII p. 354.

Payment of Government demand as an urgent legal necessity was not in contemplation of the Hindu law givers. Yet it has grown-up with the altered laws of the times as a necessity of the first rank. A Hindu widow executed a *talookdaree—potta* to raise money and to save the estate from the imminent danger arising out of non-payment of revenue. She then adopted a son, and thus caused an immediate heir or a reversioner to spring into existence, and brought about her own civil death as a widow representing the estate. The alienor satisfied the court that he had made *bonafide* enquiries and acted under the *bonafide* belief that there was no other remedy to save the estate from the impending danger. The claim of the adopted son was dismissed and the alienation was upheld *Sreenath v. Rattun Mala* S. D. A. Rep. for 1859, p. 421. But suppose, the alienation by the widow to be for strict legal necessity, e.g., to endow land or other property to perpetuate religious ceremonies established by the husband, to perform his *Sradh*, to allot suitable maintenance to persons he was bound to support, to pay his just debts, &c.—and the

Excessive  
alienation.

alienation is disproportionate or excessive, will her act be entirely supported? or, will the principles of justice, equity, and good conscience come into operation, and a fair proportion of the alienation be maintained? This is

a difficult question to answer precisely; but it is a point that may very frequently arise. It would seem to follow, like a plain deduction, that if, under the circumstances of a particular case, the alienation had been reasonably proper and commensurate with the object and the necessity, the same could be supported, why will not the alienation be maintained to that extent if the rest of the larger alienation be annulled as illegal, excessive, and improper.

The decision of the Privy Council quoted already and the cases<sup>1</sup> relied on by their Lordships for their decision contain the leading principles on the subject of *onus* of proof of legal necessity. It has been clearly laid down that, in respect of legal necessity, the power of a guardian to deal with the minor's estate, that of a father disposing of ancestral estate, that of a manager to alienate the coparcenary interest, and the power of a widow to alienate her estate of inheritance, is precisely the same. Any creditor, grantee, or alienee seeking to enforce his claim against the widow's estate is bound, at least, to show the exact nature of the transaction, and to show, that in advancing the money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one or some definitely stated and recognized necessities. It is undoubtedly the principle that the lender is not bound to see to the application of the money, and that he does not lose his rights, if, upon *bona fide* enquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist. Still he is under an obligation to do certain things. These are to enquire into the necessity for the loan and to satisfy, as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. In *I. L. R.*, 6 Cal., 843, the Lords of the Privy Council have concluded their judgment with the following observations. "The principle laid down in *Hanuman Prasad Pandey v. Mussamat Babaoee Munraj*, 6 M. I. A., 393, in regard to the manager for an infant, has been applied also to alienations by a widow of her estate of inheritance,

<sup>1</sup> *Kameswar v. Rūn Bahadur* 6 Cal., 843.

*Hanuman Prasad v. Moopraj Koonwaree* 6 M. I. A., 393.

and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law, has made an alienation of ancestral property."

It has to be borne in mind, however, that there are, sometimes, recitals in the deed of transfer executed by the party with limited rights,—a widow, manager guardian or the like, which are relied upon as conclusive evidence of the legal necessity of the transaction. It has been repeatedly ruled<sup>1</sup> that bare recitals have not such binding effect. Therefore it follows that the alienee of such estate will not have discharged the *onus* which lies on him, in accordance with the principles laid down in the foregoing decisions, by barely contending that all his enquiries into the subject of legal necessity were the admissions of the executant in the recitals in the formal document itself. In another leading case<sup>2</sup> on the subject, the deed of mortgage was for Rs. 32,000. It recited (p. 424) that the money was borrowed "Rs. 32,000 of the Company's coin, half of which is Rs. 16,000, for the payment of the debt taken to meet the marriage expenses of Kuar Enayat Singh and expenses of the case pending at Lucknow from before." The executant of the deed, Raja Lalji, was the widow's son-in-law acting under a power executed by her in his favour. Of course, the muktear had no more right than what the widow herself had to encumber the estate. Kuar Enayat was his son. The widow died in 1878, and the succession devolved on her daughter Achan Kunwar. The mortgagee's representatives brought the suit against the widow's successors. Absence of legal necessity was the main defence in the case. Owing to an improper treatment of the case by the courts below in requiring the defendants to prove the negative, that is, the absence of the necessity pleaded, the High Court shifted the *onus* on the plaintiff, and allowed him to adduce further evidence of facts beyond the bare recitals in the deed. The Court had to consider the liability of the reversioners in respect of a trade-debt

Recitals in the deed  
and the necessity.

*Onus of necessity*  
on wrong party.

<sup>1</sup> Vide *Index* "Recitals."

<sup>2</sup> *Amarnath v. Achan Kuor*. 14 All, 420 P. C.

in connection with a specific charge created by the widow. It was conceded by the Privy Council that family business is a heritable asset. Debts really necessary and contracted for the business, even without any specific charge on property created by mortgage,<sup>1</sup> are recoverable from the assets of the business in the hands of the reversioners. If it be conceded or found in a case that there was evidence of legal necessity, the Courts are not very scrupulous to pry into every pie of expenses in order to benefit the reversioner to enable him to recover the estate after refunding the amount of necessary debt. The Allahabad High Court thinks\* that this is all which the Lords of the Privy Council have laid down in the case of *Achan Kunwar*. If the bulk of the advance was proper in reference to the legal wants, such as, payment of Government revenue, partition expenses, building a well, or seeds for sowing ; and if the Court finds the whole amount to be legally due for legal necessity, the Court of appeal is unwilling to make thumb calculations to separate the chaff from the grain to deduce the figure for an equitable refund in order to restore the property to the reversioner.

It will appear from the P. C. case cited above that the plaintiffs neither averred nor attempted to prove necessity until the case was being argued in the High Court. They preferred their claim as if the widow were the absolute owner. It is very strange that they were allowed in appeal to shift their ground of action. "On appeal" say the Judicial Committee, "they were treated with great indulgence, being allowed in effect to amend their case." The sentence quoted is a clear expression of their sense of disapproval by the Lords of the Privy Council against the introduction of new pleadings in appeal. The alienee from the Hindu widow must *allege* and *prove* legal necessity to get the benefit of an absolute right. In another case,<sup>2</sup> where the pleadings as to the want of legal necessity were not very precise, the Lords of the

Family business, widow : debt of necessity, presumption of *bona fides*.  
  
Plea of necessity, a new case in appeal, or a point of late argument.

<sup>1</sup> Sakrabai v Maganlal 26 Bom., 206 F. B.

<sup>2</sup> Ghansham v. Badiya Lal 24 All., 547.

<sup>3</sup> Sham Sunder v. Achhan Kunwar, 21 All., 71 (p 81-82).

Privy Council observed :—"But their Lordships observe that in a suit like the present on a bond made by a person with restricted power of alienation, the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage." A previous decision of the same Board was relied on. Ordinarily, however, when the alienee sues, the defendant, interested in the property on reversion, seeks to protect the estate by pleading want of legal necessity; and thus the issue with *onus* on the plaintiff arises. It may be unnecessary to insert in the pleadings to start with that the alienation was for legal necessity.

The evidence that was allowed to be adduced in a case cited above introduced peculiar discrepancies into the case of legal necessity relied on.

Discrepancies as to necessity in deed, pleas, and evidence.

The recitals in the deed were of one kind, while the evidence adduced was of somewhat different description. One having a true and an honest case of necessity to make out relies on the statements in the deed which, of course, it is open to the Court to act upon or not. That depends upon the circumstances and the merits of each case. Better still, he adduces evidence of the attesting witnesses or others to prove his *bonafides* under Sec. 14 of the Indian Evidence Act. Such evidence is always available and easily forthcoming in a true case. Ordinarily, it is extremely unsafe to rely on the recitals in the deed alone. The Court will demand stronger evidence of enquiries and belief on the part of the alienee. It is easy to conceive cases in which loans have been contracted under representations of one kind, honestly believed and acted upon by the lender, and the money differently applied, perhaps unknown to the creditor. Under such circumstances, it is apprehended, the alienee should not suffer under the principles laid down by the leading Privy Council cases referred to already. But if the lender's own witnesses belie or contradict the recitals in the deed, or, if his pleas at the bar go one way, and his evidence

Corroborative evidence of recitals,

another way as to the exact legal necessity to which the money was applied, the Court of law will infer want of adequate enquiry on his part, and will hold that no case of necessity is made out. "One

effect" say the Privy Council, L.L. R., 14 All., p. 427, "of Hira Lal's evidence is to show the untrustworthiness of the statements in the mortgage-bond on which the Subordinate Judge relied to show that Motiram's advance was applied to defray the marriage expenses of Enayet and the costs of the Lucknow suit. Out of the Rs. 32,000 advanced, nearly Rs. 26,000 were applied in paying off hundies, Rs. 12,400 being due to Motiram himself. We are told nothing of the amount of Enayet's expenses; nothing of any reason why they should be paid by his grandmother instead of his father; nothing of the nature of the Lucknow suit except that it was for ancestral property; nothing to show that in March 1873, any costs at all had been incurred by Hulas. So that the statements in the bond receive no effectual support and much contradiction from the new evidence."

"But the plaintiffs rely on an entirely new cause of necessity, viz, that Khairati's money business, which had been carried on by Hulas under the management of Lalji, was in a critical state and that it was necessary to borrow money in order to ward off total insolvency. On this point their Lordships agree with the High Court in thinking the effect of Hira Lal's evidence to be that at Khairati's death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business before venturing to endorse the opinion of the High Court."

"Their Lordships prefer to rest this part of the case on the entire failure of the plaintiffs to discharge the burden of proof which lies upon them. It has been above stated, in accordance with the often cited case of *Hanuman Pershad v. Munraj Koonwar*



6. M. I. A., 393, that, in order to sustain an alienation by a Hindu widow of the *corpus* of her husband's estate, it must be shown, either that there was legal necessity for the alienation, or at least that the grantee was led on reasonable grounds to believe that there

Creditor's enquiry as to necessity, its existence, and power of the agent and manager to bind estate of widow and of infant.

was. But the plaintiffs have not proved either actual necessity, even that Motiram believed that there was such necessity, or that he ever made any enquiry on the subject. He may have rested content with the vague and misleading statements in the deed. He may have considered, as the plaintiffs have considered in this litigation, that the question of necessity did not concern him. He may have thought, as they apparently have thought, that he was taking title under an absolute owner. Anyhow, the plaintiffs have not performed their legal obligation of proving that their ancestor performed his legal obligation, which was to enquire and satisfy himself that the widow from whom he was taking a charge upon her husband's inheritance had a proper justification for so charging it. That is sufficient to defeat the suit. Their Lordships will humbly advise Her Majesty to dismiss the appeal."

The story of this family's indebtedness is a very interesting study of the leading principles which we are now considering. The management of the family and of its large estate since the death of Raja Khairati Lal, which took place in 1866, was such as to induce many rich money lenders to speculate on the estate inherited by the Raja's widow and his daughter, named, respectively, Rani Hulas Kunwar, and Musst. Achhan Kunwar. The decision quoted above arose out of an action which was obviously instituted when Raja Lalji, husband of Musst. Achhan Kunwar, was alive. He died in 1888. On the 2nd December 1877 and on the 1st April 1881, the said Lalji executed, as agent, on behalf of himself, Hulas, Achhan and her son, two mortgage bonds hypothecating the villages which belonged to Raja Khairati Lal, and which descended to his widow, and through her to the daughter and her son. Raja Lalji, as observed before, was the recognized manager of the estate.

The creditor brought an action on these two bonds to recover Rs. 86,338 by the usual sale decree. The Subordinate Judge held

that the personal remedy on the bonds was barred by limitation, but that the bonds were effectual against the properties which Raja Lalji had been authorized by the representatives of the estate to deal with. The claim was accordingly decreed. The High Court reversed this decision and dismissed the suit with costs. The findings of the High Court were as follows:

Achhan's son was a minor and consequently was not bound by his execution of the Muktearnama and bond of 1877. It was understood by the Ranies that the Muktearnama only conferred on Lalji the power to manage the villages, but no power to encumber the estate. None of the two bonds in suit had been explained to the widows, and there was no justifying legal necessity or family purpose for incurring such heavy debts. It was not proved that the

Widow's Muktear. Her due appreciation of facts.

Husband Muktear, undue advantage.

mortgagees satisfied themselves upon any reasonable enquiry that there was any family necessity for the making of the bonds. There was evidence to show that Raja Lalji, either with the active assistance or with the knowledge and connivance of the mortgagees, took an undue advantage of his position as father and of the youth, inexperience, and want of business knowledge of the parties concerned in the estate, in procuring the execution of the bonds.

The suit having been dismissed by the High Court of Allahabad, the matter was taken up before their Lordships of the Privy Council. On July 28, 1898, Lord Davey delivered their Lordships' judgment, concurring with the High Court.<sup>1</sup> In an appeal from the Court of the Judicial Commissioner of Oudh,<sup>2</sup> the widow apparently lived a long time after the death of her husband who died leaving a large estate and a debt of Rupees 65,000. She succeeded to the estate the annual income of which was roughly estimated at about Rupees 8000 or Rs. 9000. The widow went on executing mortgage after mortgage by way of renewals. The suit was filed on one of the later mortgages executed by her against the reversioner in possession of the estate after the widow's death. The

<sup>1</sup> Sham Sundar v. Musst. Achhan Kunwar 2 Cal. W. N. CCCXXXVIII 21 All., 71.

<sup>2</sup> Maheswar v. Rattansingh, 23 Cal., 766.

defendant pleaded want of legal necessity. No clear or satisfactory evidence was offered connecting the mortgage in suit or the previous

Vague and general evidence useless

Connecting link must be established.

mortgages extinguished thereby, with the debt of the husband. The Judicial Committee, held following *Hanuman Prasad Pande's* case that the burden of proving the money to have been advanced to the widow for legal necessity lay on the plaintiff. It was further held that general evidence to the effect that the husband died in debt, and that the widow substituted new securities at reduced rates of interest was held no sufficient justification. The defendant could rebut the plaintiff's case, but he was not bound to do so, by showing that the current incomes were large enough to satisfy the demands. In a case<sup>1</sup> before the Privy Council, their Lordships went the length of reducing the rate of interest from Rs. 18 to Rs. 12 per year on a

Current income. Interest, reduced equitably

mortgage which was held not to have been wholly unnecessary. The full test of legal necessity was there wanting, and the mortgage had been executed by a widow. A husband died leaving a debt of Rs. 25,000. When the pressure of demand for repayment became heavy, the widow to repay the said debt, to defray certain necessary expences of her own, as well as to carry on necessary litigation incurred more debts, and passed a consolidated mortgage for Rs. 30,000. The mortgage was held binding on the reversioner.<sup>2</sup> The question of current and prospective incomes of the lady, derived from the estate of inheritance was raised in the pleadings. The Court, however, considered that the matter of current income was not of any material importance in such cases, on the ground, as held in the case, that such income was absolutely at the disposal of the woman. It was pointed out in the ruling just cited that the only criterion is to see whether there was actual pressure for the time being. But it is hardly correct to say that the prudent management of the current income is not a matter for consideration in such cases. There cannot be any doubt that in deciding cases of legal necessity, the question of existing income has a great bearing to find

<sup>1</sup> *Hurronath v. Randhir* 18 Cal. 311.

<sup>2</sup> *Rama Swami v. Mangai* 18 Mad. 173.

whether there was justifying reason<sup>1</sup> of legal necessity for the alienation in question.<sup>2</sup> In the cases quoted below though the courts held that the pressing need is always a matter for serious consideration yet the necessity for the alienation would very much depend on the answer to the question whether the widow could or could not, with reference to the estate and the income in her hand, have raised the necessary amount to meet the purpose. On the latter ground the alienations effected by the widows, in the cases cited, were set aside after her life. It follows therefore that the extent and the nature of the necessity for the time being as well as the question of the income, indebtedness, solvency &c. of the life incumbent are all matters of equal moment and importance for the decision of the court. When the pressing necessity arises, and there is a current income, questions may arise whether the female heiress should have mortgaged or sold an adequate portion of the estate. Selling a part for fair price is at times a prudent act, protecting the seller as well the purchaser acting after enquiry.<sup>3</sup> If excessive mortgage is effected, the reversioner gets *pro tanto* relief, measured out, as it were, by the extent of the legal necessity.<sup>3</sup> But the question whether the sale or the mortgage was good, and if either, to what extent, is not a matter of very serious concern with the alienee from a Hindu widow. It relates to the question of management in which the creditor has no hand, and regarding which he is protected by the principles laid down by the Privy Council in *Hanuman Prasad Pande's* case. It will be seen, however, whether he took any part to bring about the necessities, to impose the pressure more heavily than he should, to have disregarded the current income which could have lightened the burden. He must steer clear of all charges of *mala fides* and collusion to defeat the chances of the prospective heir. In some early decisions, it has been laid down that the purchaser is not bound to enquire whether the debt could

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<sup>1</sup> Lala Bayjnath vs. Bissen, 19 W. R. 80. Purandas vs. Beniram, I. C. P. L. R. 130. Antaji v. Dattaji 19 Bom. 36.

<sup>2</sup> Naba Kumar v. Bhaba Sundari 3 B. L. R., 375.

<sup>3</sup> Lalit v. Shridhor 5 B. L. R., 176.

have been met from other sources.<sup>1</sup> An early Bengal decision laid down nearly the opposite principle. The Judges of the Sudder Dewani Adalat said. "It may be shown that the ostensible object of the loan was to pay off Government revenue ; but to render such a loan binding upon those who had reversionary interests in the property, it must also be satisfactorily proved that such loan was absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor."<sup>2</sup> In order to see which of the

Conflict of views in early cases. two conflicting earlier views of the question is deserving of preference, the following observations of Mr. Mayne may be considered. With reference to the Calcutta S. D. case, noted above, the learned commentator says :— "Here the law seems to be laid down rather too strictly. The person, who deals with the manager of a joint family property, has to consider the propriety and necessity of the transaction in which he is engaged, not merely the propriety and necessity of paying the debt which is the pretext for the transaction. If the debt is improper or unnecessary, and known to be so by the lender, of course the transaction is invalid. If the payment of the debt is proper and necessary, the transaction will still be invalid unless the lender has reasonable ground for supposing that it can ~~not~~ be met without his assistance. The caprice or extravagance of the proprietor is only material as showing either that the object of the transaction was an improper one, or the necessity for it was nonexistent." Starting, then, with the view of law as propounded in some of the early decisions of Madras and the North Western Provinces noted above as correct, we have yet to see what would be the legal effect of the proof that other sources of income were available for the payment of the debt. It would appear, that beyond giving rise to a presumption of collusion in the matter of the alienation complained of, and beyond the possibility of drawing certain inferences as regards the existence or otherwise of the pressing necessity, the effect of the proof would hardly go so far

<sup>1</sup> Saravana *vs.* Muttaya 6 Mad. H. C. 371. Peraswamy *vs.* Salugai 8 Mad. H. C. 157. Reotee *vs.* Ramjeit 2 N. W. P. H. C. 50

<sup>2</sup> Damodhar *vs.* Bhojo S. D. of 1858, 802.

as to avoid the transaction, if the pressure of the legal necessity is proved *aliunde*. In a Madras case,<sup>1</sup> it has been laid down that a

Extreme view  
of Madras.

widow is entitled to mortgage the estate for the payment of her husband's debts, and that she is not bound to discharge them out of the current income. It has also been said that ordinarily a widow may not sell if she can conveniently mortgage on moderate terms. Because a mortgage, ordinarily, is more beneficial to the reversioners than a sale out and out. But with reference to the contention that she is bound to apply the income of her husband's estate in discharge of his debts, the Madras High Court, in the case noted above, says (p. 119). "The net income is, under Hindu Law, as administered in this Presidency, her own exclusive property as widow, and she is not

Current income widow's  
exclusive disposal.

bound either to save or apply it for the benefit of the reversioners. She is no doubt bound to pay her husband's debts from it, because she had taken charge of the whole property left by him, whilst her right of inheritance extends only to the property as diminished or affected by his debts. As between her and the reversioners, she is entitled to say—'I will pay my husband's debts by the sale of his property and take the residue, and I desire to keep the net income derived from it and to spend or invest it as I please.' I do not, however, desire to be understood as holding, that she is entitled to ignore the charges which are legally payable out of the gross income, such as the *peiscash* and maintenance due to other members of the family, and thereby add to the debt left by the husband, so as to prejudice the reversioner. Applying these principles to the case before us, I am of opinion that the gross income, less the charges she is legally bound to pay from it, is her exclusive property as between her and the reversioners." This is declared to be the view of law in the Madras Presidency. The Allahabad High Court says,—*Rani Kanno v. B. J. Lacy*, 19 All., 235, that the rents and profits of an estate in the hand of a widow are not assets of her deceased husband that are available to the decree-holder under sec. 234 of the C. P. Code. Some of the early rulings of Bengal at the commencement of the British Courts of law, aimed

<sup>1</sup> Ramaswami vs. Mangai. 18 Mad. 113.

as it will be seen below, to make the widow the absolute mistress of the current incomes. It is apprehended, however, that

Repugnance to the text  
and to Hindu mind.

these extreme un-Hindu views are not quite commendable; and so far as the Presidency of Bengal is concerned, there is the Daya-

bhaga,—see Chap. XI para 61, which propounds the contrary principle. “Let not woman make waste. Here “waste” intends expenditure not useful to the owner of the property.” This is, at all events, the *Dharm Sastra* of Bengal. This is also the general feeling of the Hindu mind. If the income of the estate left by the deceased husband is handsome, is the widow competent to spend the whole income capriciously?—and that when there are pressing demands for marriages, education, or debts left outstanding? Surely not. Regarding the early Bengal rulings, we have a decision<sup>1</sup> by Glover J. to the effect that a Hindu widow with life-interest in her deceased husband’s estate would be entitled to make the fullest use of the usufruct of that estate: and that it was doubtful under the authorities that then existed whether she could be in any way restrained, however wasteful her expenditures, so long as she kept within the limits of her income, and made no attempt to alienate. It was held also that if she chose to economize expenses and make savings, she could give them away to any one she pleased. *Grose v. Omritmoyee*, 12 W. R., 13 O. J. (per Macpherson J.) is to the same effect. But Sir Barnes Peacock, the learned Chief Justice of Bengal in those days did not follow that view. Dr. T. N. Mitra, in his *Togore Law Lectures on Hindu Widow*, 1879, notices a case which was not reported. He quotes the facts of the case from the reports of the newspaper, the *Englishman* of the 2nd July, 1853. It was a decision of Sir Lawrence Peel, and was to the following effect, that if a Hindu widow, enjoined by the *Sastras* and the custom of the country to live strictly economically and in seclusion, should nevertheless live freely and expensively, her disposals and expenditures can not be questioned. “As to the *corpus* of her husband’s estate, she can not alienate it; but the income of it, during her life, forms no part of the husband’s estate. If she received and spent it all, no one could call her in question. So if she has money in hand,

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1. *Chandrally v. Brody* 9 W. R., 584.

she may dispose of it as she pleases. Money in hand and accumulations are not the samething. We do not decide the question as to whether the accumulations belong to the husband's representatives."

The aforesaid decisions lay down one broad principle. The widow has an absolute disposing power over the income or the usufruct of the estate. But she has *no right to alienate* any part of the estate. It is needless to question the correctness

Wrong view of early rulings re incomes of widows. of these propositions, if they imply as they must necessarily do, that in order to avoid alienations,

voluntary as well as judicial, the widow is rendered bound to meet the ordinary and inevitable family needs, *e. g.* marriages of girls, *śradhs* of ancestors, education of children, payment of Government charges, repayment of the deceased's debts, and maintenance &c. These demands and necessities induce and compel alienations by widows. It would be laying down an impracticable paradox if the woman is told to spend away all the income in any manner she chooses, and at the same time not to encumber or to alienate the estate in any way. Instead of expressing in that fast and loose manner, it would have been better if the rulings of Courts, noticed above, adhered to the texts of sages which enjoin on the Hindu widows strict piety, seclusion, economy, and rigid self-denial. That would have the natural effect to make savings. Reverence to ancestors and religious regard for the spiritual welfare of the deceased husband would make all sorts of legal necessities the first concerns for being met; and then there would be no possibilities or chances for invalid alienations which are prohibited. The correct view on the subject is laid down in subsequent rulings of the Privy Council. In *Srimuttie Surju Money v. Dino Bandhoo*, 9 M. I. A. 123, their Lordships appear to have laid down that all the accumulations of a fund which had descended to a widow, from the time the estate vested in her, are absolutely her own, in her own right, as distinct from the fund itself which she is only entitled to hold and enjoy

Correct P. C view on widow's income.

as a widow. But in a subsequent ruling, however, *Gonda Koor v. Koor Udeysing* 14 B. L. R., p. 165 their Lordships refused to consider the ruling "as a conclusive or even as a direct authority upon the question." In another case, *Mustt. Bhugbatty Dasee vs. Choudhry*



Alienation of profits  
illegal as waste.

*Bholanath* 24 W. R., p. 168, the Privy Council held that the Hindu widow has no power to alienate the profits of the estate which she had inherited from her husband, and that any property which she may purchase from such profits would become an increment to the estate which she had inherited, and would follow the estate with all the incidence of a widow's estate. In the memorable Full Bench case of Calcutta,<sup>1</sup> Justice Dwaraka Nath Mitter questioned the correctness of the view of Justice Glover in 9 W. R. p. 584 and remarked,—see p. 392,—that “the only right which the widow acquires in her husband's property is the right of using that property for the benefit of his soul and for no other purpose whatever. \* \* \* Every expenditure incurred by the widow out of the estate inherited by her \* \* \* which is not conducive to his spiritual benefit is an act of waste.” The eminent Hindu lawyer, Mitter J. referred to the Privy Council decision,<sup>2</sup> as laying down the sound view on the subject. Thus the earlier views and prevarications on the subject of the widow's rights in and power over moveables may thus be considered to have been set at rest. By this, the moveables of all sorts are meant, except, of course, the *Stridhanam*. With reference to the last mentioned P. C. decision, Mr. Justice Mitter Says,—

Moveables of all  
sorts widow's re-  
stricted right

“These remarks, it is true, were made by their Lordships with reference to the moveable portion of the estate, inherited by a widow from her husband. But they are, in my opinion equally applicable to the usufruct of that estate.”

In *Lalla Byjnath v. Besin*, 19 W. R., 80, the widow borrowed money liberally and she made alienations of the estate. It was proved that the husband died leaving two small debts unpaid. One of Rs. 800 and the second of Rs. 200. The income of the deceased's estate was about Rs. 3750 or Rs. 4000 per year. The estate, thus, was good enough for all the ordinary purposes and for settling the debts aforesaid. Upon these facts the ruling of the court was that as the estate devolved to the widow almost unencumbered, with an

1. *Kerry Kolitanee vs. Maniram Kalita*, 19 W. R., p. 367.

2. *Bhagwandeon v. Mejna* 9 W. R. 23 XI. Moore 513.

Income large pre-  
sumption against neces-  
sity & alienation void.

ample income more than sufficient to pay a small debt due by her husband, the Government revenue, and all other expenses, including the marriage of daughters, the widow was not justified by any legal necessity in alienating the estate in the absence of any actual pressure, such as, an outstanding decree, or impending sale for arrears of revenue. The alienations were held wholly invalid beyond the lifetime of the widow.

Regarding women, the injunctions of Manu are,<sup>1</sup>

"147. By a girl or by a young woman, or by a woman advanced in years, nothing must be done, even in her own dwelling place, according to her mere pleasure.

Early texts on  
females, economy  
enjoined.

"1118. In childhood must a female be dependent on her father; in youth, on her husband; her lord being dead, on her sons; *if she have no sons, on the near Kinsmen of her husband*;.....a woman must never seek independence.

"150. She must always live with a cheerful temper, with good management of the affairs of the house, with great care of the household furniture, and with a frugal hand, in all her expenses."

Sir Thomas Strange, late Chief Justice of Madras, in his treatise on Hindu Law 5th Edition (1875) page 236, says, "with respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to regard herself as little more than a tenant for life and trustee for the next heirs of property so possessed; being (as already intimated) restricted from alienating it, by her independent act, unless for necessary subsistence or purpose beneficial to the deceased."

In the Presidency of Bombay where more liberal views are entertained on the powers of Hindu female heirs, a judgment of the Full Bench in 1893,<sup>2</sup> has held, somewhat modifying the views of some of the early decisions of the same High Court, that a widow

<sup>1</sup> Laws of Manu translated Sir William Jones Chap. V.

<sup>2</sup> Gangadhar vs. Chandrabhaga 17 Bom. 690. But see Matilal v. Ratilal 21 Bom. 170. And Gandhi v. Bai Jadab 24 Bom 192.

is incompetent to bequeath the moveable property which she inherited and that such property devolves on her death to her husband's heirs. It may be argued that the text of *Vrihaspati*, namely "whatever property a man possesses.....that the wife shall enjoy after the death of her husband with the exception of fixed property," has moulded the views of the Western Presidency greatly, the commentators and lawyers placing a liberal construction on the word 'enjoy.' The right of enjoyment is not denied, but that right does not authorize extravagance and wastefulness. West and Buhler, an undoubted authority of the Mahratta Country quote with approval the decision<sup>1</sup> of the Privy Council which lays down that the savings of a widow out of her husband's estate are accretions thereto, *unless otherwise distinctly appropriated*.

Ordinarily, the court will hardly interfere with the modes which the widow follows to derive and to enjoy the income from the estate in her possession. But it may not, perhaps, be always safe to hold that an imprudent or excessive lease, a long term lease, a lease on pepper-corn rent, a lease to destroy, waste, or to deteriorate the estate, may not, on good ground being shown, be impeached by the reversioner. An ordinary lease to derive an ordinary income, is not an impeachable transaction: because a female heir is perfectly entitled to deal with the estate in her life time, in the same way as the male. The reversioner has no cause of action to question the sale or mortgage of the estate which is to enure for her life-time. There must be an exceptional circumstance, tending to prejudice the estate in her hands to afford a ground for question on the part of the contingent heir. A widow in Madras leased her estate to Government. The State Railway Company worked quarries for stones on a part of the land for which Government paid over Rs. 5000 as compensation to the lessees. The reversioner stepped in, claimed the money, and alleged that quarrying was an act of waste that was permitted by the widow, and that it was a sort of conversion of the stones into money. The claim was held to be a far-fetched one, and to be not tenable.<sup>2</sup> The Court held, on the authority of the noted *Shiva*

1. *Isri Dutt v. Mt. Honsbutti*, L. R. J. A. 1507.

2. *Subha Reddi v. Chenga* 22 Mad. 126.

*Quarrying mine, cutting timber &c.* *Ganga Case*,<sup>1</sup> that a Hindu widow is not like a tenant for life according to English Law. She is the owner of the estate for the time being. She is not a trustee accountable for her management to the heirs of her husband. Opening a mine, or cutting down forest timber or selling fire-wood from the village forests &c. are starting new venues of income, profitable rather than otherwise to the estate. The price of stones, timber &c. severed from earth is regarded as an income. The severance thereof is not alienation of immoveable property to entitle the reversioner to seek the usual declaratory relief. But if the processes of spoliation of land, forest, garden and the like go on to amount to waste, the reversioner, it is apprehended, is entitled to have the widow restrained from working the destruction of the property.—See *Hurrydoss v. Rungomoney*, 2 Sev. 657; and *Govind Moni v. Shamlal*, B. L. R. Sup. Vol. 48, at page 53. Ordinarily speaking, it is a rule of law that a reversioner has no right, even if the widow be squandering her income at her pleasure, although it is considerable, and her expenses out of all proportion, to sue and check her in any way, so long as she makes no improper alienations. But if any property is alienated, and such property is land, house,

Income, a material test in deciding necessity.

or any other immoveable estate, and it is shown that there was sufficient income available which would have,\* under proper and prudent management, avoided the alienation, then the question will arise whether it will be in the mouth of the widow to say 'I have spent all the current incomes as I pleased, you have no right to enquire how I spent them. There was an actual necessity such as marriage, *Sradh*, or the like, and I have sold the field or mortgaged the house to meet the necessity that arose'. It is very doubtful if under the circumstances such a plea of absolute right over the current incomes will be allowed to prevail, and the alienation imprudently brought about would stand. In a Madras case,<sup>2</sup> the widow sold

Sale beyond necessity treated as mortgage; Refund.

the estate for less its value and for price which was more than what she needed.

The court, following the equitable view

1 *Katama Natchiar* 9 M. L. A. 543.

2 *Subraimanya v. Pangu Sami* 6 Mad. 92.

already discussed, treated the sale as if it were a mortgage, and the reversioner was allowed to redeem the estate on refund of the value received. Compare *Phoolchand v. Raghubans*, 9 W. R. 108.; *Mathura v. Gopal* 11 B. L. R., 416, 20 W. R., 187. The plaintiff in such cases has to meet the plea of good faith raised by the alienee. To rebut this, he is bound to show that there was want of care or enquiry into the circumstances necessitating the advance. If the want of necessity in whole or in part is made out, the onus of *bona fides* is on the alienee. See—*Kamikka v. Srimati Jagadamba* 5 B. L. R. 508; *Lallit v. Sridhor*, 13 W. R., 457.

In *Purandas vs. Beniram* I. C. P. L. R. p. 130, the sale by a widow of her estate was for Rupees 700: Rupees 500 was spent for *Sradh* and other necessary purposes. But it was held by the Courts below that the widow could have raised the sum otherwise than by selling the village; also the equitable considerations arising out of alienee's taking an improper advantage against the needy widow arose. It was found that the widow had other property, that she was ready when Purandas (reversioner) objected to the sale to refund the purchase money, and that Beniram (the alienee) had to bring a suit to make her complete the sale. The sale was set aside and the money refunded.

Intimately connected with the subject of current income is that of accumulations, and it remains to be considered  
 Accumulations, how the accumulations made or effected will affect the question of legal necessity in relation to the alienations by a Hindu widow. The first point to consider is what are accumulations, and what is the interest of the Hindu widow in them? Much depends on the right comprehension of the exact meaning of the term, "accumulations." Its correct import in reference to the widow's estate is deducible from the authorities that exist.

With respect to current income, savings, and accumulations, it may at once be said that on the purely academic view of the matter in the texts and in the abstract Hindu Law, there is no distinction as regards her power and control, between current income on one hand, and the savings and accumulations on the other. The strict

injunctions of the Hindu *Sastras* derived from the plain reading of the texts already quoted from *Manu*, and other passages in the writings of the ancient sages, which seem to restrict the Hindu widow in the use and enjoyment of her husband's property while she lives, can not be regarded, at the present day, as of much legal

force, whatever may be their effect as religious  
 Widow's rights  
 thereon. or moral precepts. Her absolute right to the

fullest benefit of the estate inherited has been very well settled and recognized. "A woman," says—Mr. Mayne, "is in no sense a trustee for those who may come after her. She is not bound to invest the principal. If she chooses to invest it, she is not bound to prefer one form of investment to another form, as being more likely to protect the interest of the reversioners. She is forbidden to commit waste or to endanger the property in her possession; but short of that, she may spend the income and manage the principal as she thinks proper. If she makes savings she can give them away as she likes during her life. She is not bound to leave any thing behind her beyond that which she received." The above extract from Mr. Mayne's well known work on Hindu law contains the *placita* of rulings, and his own deductions therefrom. The gradual growth of legal principles from moral and religious injunctions and the introduction of reasonable restrictions against her power to deal freely with moveable as well as immoveable properties are obvious and deserve recognition. Departures here and there do no doubt exist. But one cannot fail to observe that there is almost an unanimity in the current views to restrict the widow's power of alienation within reasonable limits of the

Legal necessity,  
 a mixed question  
 of law & fact. *Sastric* texts, already noted. Legal necessity is a mixed question of fact and of law; and in the latter aspect, it embraces moral and religious

considerations of very wide application in the transactions of life, such as, marriage, funeral obsequies, pilgrimage, pious gifts, spiritual benefits, education and so forth. In the decision, therefore, of the validity of an alienation on the ground of legal necessity in the

Equity against legal  
 necessity in case of  
 incomes & savings, face of existing incomes, accumulated savings, and accretions to the estate of the last owner a broad range of facts and circumstances

deserves consideration. But the equity leans strongly in favour of the next heir seeking to undo an act of alienation in the face of handsome income for the lady. Dr. Mitra

Dr. Mitra's Summary  
on Do

in his summary on his Lectures on Hindu Widow, (Tagore Law Lectures of 1879 page 275) deduces, after a careful review of the authorities, the following principles,—

" 2 If the property is purchased from those profits, it is doubtful whether she has the absolute power to alienate it.

" 3 If she leaves property so purchased undisposed of at her death, it will form part of her husband's estate and follow the same in its devolution."

The text of Katyana " Let the sonless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy *with moderation* the property until her death" has been

Texts on do interpreted by Colebrooke in his Digest Vol. III. (Lon. Ed.) pp. 471, 472, to mean that she may use it to support life, but not to wear delicate apparel or the like.<sup>1</sup>

Later rulings, however, on the subject of savings and accumulations have introduced and established another principle that deserves to be remembered. In *Grish Chandra vs. Broughton* 14 Cal.

Widow's right absolute on the accumulated savings after husband's death. p. 861; the right of a Hindu widow to the income and accumulations has been discussed; and Trevelyan J. has pointed out

that the widow's right therein is absolute if they accrue after her husband's death, and that right is not affected by "the fact that she may receive them in one lump sum. The chief question in this case was that involved in issue No. 5, and it has been held that her

right in this respect is dependent on her intention as evidenced by her own acts in relation to the estate. If she invested her savings, in such a manner as to show that she meant to augment her husband's estate, she would be restricted *qua* such investment in the same manner as if it were a part of the parent estate;

<sup>1</sup> 1. Vyav Chandrika page 123 of Babu Shyama Charan Sirkar.

but if she evinced no such intention, her power would be absolute during her life time. In this case, the deceased husband left a will in favour of his younger brother, (the well-known Mullick family of Calcutta,) and the widow of the deceased passed a release, when disputes were going on between herself and the said brother as to the *factum* and the validity of the will, in consideration of her interest in the deceased's estate. On receipt of a large sum of money she purchased a house and made certain investments. The case came up in appeal<sup>1</sup> before Petheran C. J. and Wilson J. Eventually the case went up to the Privy Council.<sup>2</sup> The point in question was threshed out and argued exhaustively before the higher courts, and it was held that the *intention* of the widow was the guide and the governing principle. The consideration for the release was regarded to be the accumulations handed over to the widow by the person entitled to the reversion, after the estate had vested in him. The accumulations accrued during the eight years of her widow-hood and the same was undisposed of by the will. It was not received by the widow as a capitalized part of the inheritance, but as income that had been accumulated during the tenure of her widow's estate. She invested the money as her separate property and created certain trusts. *Held*, as far as the Privy Council, that the money so invested by the widow belonged to her as income derived from her widow's estate and was subject to her own disposition. It will be noticed, that though it was a will-case, their Lordships of the Privy Council treated the money as widow's estate undisposed of by the will. The money was received on the basis of a release passed when contentions against the will were going on, and it was given in lieu of her claims. It remains, nevertheless, to be seen whether the income, savings, and accumulations, made by the widow during the tenure of her estate, should always be regarded so broadly and liberally in favour of her absolute power, or, whether, her *intentions* in the matter of investments will not only be a question of difficulty for proof, but it will receive a strict interpretation in

How to construe  
intention ?

1. Sowdamini Dassi vs. Broughton 16 Cal. 514.

2. Sowdamini Dassi vs. The Administrator of Bengal and others, 20 Cal. p. 433.



accordance with the *obiter* of another *dictum* in a judgment of the Privy Council<sup>1</sup> as the more correct view of the Hindu Law. Their Lordships have said "It is not the case of a widow inheriting and purchasing property out of assets of the estate which she takes as a widow ; for those have been considered by law as an augmentation of the estate." Mr. Mayne considers that the question is one which has caused the greatest difficulty and confusion, and adds, "It is admitted that a female heir need not make any savings at all. She may spend her whole income every year, either upon herself or by giving it away at her pleasure. But suppose she does not choose to spend her whole income, but accumulates the savings, may she dispose of these at her pleasure ? If she has invested them, or purchased property with them, does it still remain at her disposal during her life ? If she has not disposed of it, does it pass at her death with the rest of the property or does it pass as her separate property to her own heirs ?" Upon these enquiries he proceeded to discuss the case-law on the subject as far as the learned author could quote, and deduced the same principles as have been laid down in the rulings already cited. In a case before the High Court of Bombay<sup>2</sup> Sir Charles Sargent C. J. lays down the law on the subject, in his characteristic brief language thus :— "It is clear upon the authorities that the savings or accumulations, as they are sometimes termed, by a widow out of the income of her husband's estate pass to *his* heirs on her death." The learned judge quotes a Privy Council decision<sup>3</sup> in support of his view. The theory of *intention* on the part of the widow as to how she meant to treat the savings and accumulations was not altogether discarded by the learned Judge, and it is a theory that has received fullest possible developments in the later decisions of courts already noticed.—

With respect to the doctrine of *intention*, again it will not be out of place to quote the view of the Privy Council in another earlier decision.<sup>4</sup> It has been suggested by the Judicial Committee

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1 Ram Bejai *vs.* Jagat Pal 18 Cl. (119)

2 Revett Carnac *vs.* Jivibai, 10 Bom. p. 478.

3 Isre Dut Koer *vs.* Mussumat Hansbutti Koerain 10 I. A. 150.

4. Gonda Kooer *vs.* Kooer Oody 14 B. L. R., 159.

that perhaps purchases made by a widow from the income of her husband's estate are not necessarily accretions to it, unless she *intended* them to be such ; and that such intention *will be presumed*

in the absence of proof to the contrary, that is  
 Presumption as to intention, unless it is rebutted by evidence of a direct in-

tention on her part to appropriate to herself, and to sever from the bulk of the estate such purchases as she had made. But the theory of presumption, or rather, the question of *onus* involved in the earlier view of the Privy Council Ruling, quoted above, has been much shaken by the later decisions of their Lordships as interpreted by a Madras decision<sup>1</sup> by the light of most of the leading cases on the subject. In the Madras case, the reversionary heir sued the widow's assignee of the estate purchased by

her with the income. There was or could  
 Estate purchased by widow with income, be no question of intention ; as the widow  
 her self-acquisition ? made no distinction whatever between the

estate of inheritance and the estate of her purchase. She managed and enjoyed both the classes of the estate in the same manner.<sup>2</sup> It was held that the reversioner could not recover possession from her assignee after her death, on the ground of the said alienation having been made for no legal necessity. But as to whether the estate purchased by her with the aid of the current income is her self-acquisition of that technical class,—known as her *stridhan*, gains of skill, labour, or learning, which goes to her own heir, as distinguished from the reversioners after her death, is yet a point of controversy. The preponderance of authority is in favour of the view that such property follows the parent estate. In a case<sup>3</sup> of reference to the High Court of Bombay cited above Sargent, C. J., after reviewing the authorities up to 1885, answered affirmatively the questions that the balance of profits to the credit of the Hindu widow formed a portion of her own estate, and that it would go to the plaintiffs, her administrators, in preference to her reversioners. But the High Court of Calcutta, in an early case<sup>4</sup> has held that lands purchased by a widow with the money derived from the

1. *Akkanna vs. Venkayya* 25 Mad., 351.

2. See Mr. Mayne's Summary of rulings 6th Edition paras, 626 630.

3. *Revett-Carnac vs. Jivibai* 10 Bom. 478.

4. *Anund Chandra vs. Nilmony*, 9 Cal. 758.

income of her life estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control. The jealousy of the ancient texts, numerouslly quoted already, is to enjoin on the widow strict frugality, at least for the purposes of her own personal living. On the other hand, the same texts afford ample latitudes for religious and charitable works. In the name of religion or charity it may not be permissible for her to alienate land. Because that may not be an alienation for legal necessity. But the point of legal necessity does not arise, in the generality of cases, when the woman is spending money out of her current incomes, or even out of the savings made by her.

Liberty to spend she has but has the widow an unbridled license to waste the income? The question has not been directly and pointedly answered in the case-law. The feeling of Hindu orthodoxy is in favour of imposing some kind of whole ~~some~~ restraint upon wasteful expenditures, and to curb the vicious or the immoral female spend thrift. The bent of Hindu rever- sionary feeling is to count and to mark from distance every pice that is properly saved by the female in possession of the estate of a deceased male. Such a feeling, I will submit, will receive a shock to read the broad generalizations or the so-called logical conclusions of an early Calcutta ruling <sup>1</sup> per Ainslie J. The learned Judge has remarked that there was no distinction in principle between income and savings. "If a distinction" said the Judge "is to be drawn between current income and accumulations, where is the line to be drawn? When does the surplus cease to be part of the current income? There is no rule requiring a widow to make up her accounts at stated intervals, and carry unexpended balances to the credit of the husband's estate. How are we to say that up to 31st December, she is free to spend as she chooses the money in hand, but that on the 1st January it lapses like an unexpended assignment of public money at the close of the financial year? Who is to audit the accounts? If she is accountable to the heirs of

Income and savings,  
are they the same thing?

her husband, not only for the safe custody of the estate, but for the expenditure of the income, then I can understand that she is not free to give away immoveable property purchased out of the surplus. I may say once for all that, in speaking of surplus income, I may assume that it is a *bona fide* surplus, and that

Alienation  
prohibited.

the expenditure of it will not involve any improper alienation of the *corpus* to meet charges which a widow is required to provide for. Indeed, in such case I do not see how she is at liberty to give away or squander any portion of the income, whether as cash or after it has been converted into property of any description." The learned Judge then went on to review the authorities at some length, most of which have been discussed in the preceeding pages, and he considered that the question of the widow's power to alienate property acquired out of the savings from the income of her husband's estate was still unsettled and had not been concluded by authority. He was, however, inclined to think that the logical conclusion from her absolute power over the income and savings was to show that she had the power to alienate, and that a suit will not lie to set aside an alienation by Hindu widow of property acquired from the accumulations of the profits. Later rulings, however, as we have seen, show that the principle thus stated can not be im-

Correct view on do. plicitly followed, that the point depended entirely on her *intention* as to how she treated

or dealt with the accumulations, and that presumption will be made that she meant to treat and to deal with the estate acquired with the savings and accumulations as a part of the *corpus* of her inheritance. Unless, therefore, the presumption was clearly rebutted by strong and unimpeachable evidence and some unmistakeable overt acts, as in *Grish Chandra Roy vs. Broughton* and others, 14 Cal., p. 861, the restrictions against alienation under the doctrine of legal necessity will apply equally, whether the estate is inherited or acquired with inherited profits.

To the above questions, formulated by Ainslie J., the reversioner is able under the texts or the principles of Hindu Law and traditions, to give replies. These replies may not have much force under ordinary circumstances; but they have the support of the current

notions of the people founded on the belief that if savings and accumulations are effected after all sorts of expenditures within the reasonable bounds, having regard for the income and the social standing of the family, the same in kind or in any kind of estate acquired will follow the parent estate. Barring this feeling of the ordinary Hindu orthodoxy, the widow is absolutely unhampered in the disposal of all the current incomes in any way she thinks proper.

Under ordinary circumstances, as we see in practice, the Hindu widow is seldom restrained by her husband's kindreds in her choice to spend or to dispose of the current incomes or the cash savings thereof. The contemporary accounts of the munificence and charities of the late Maharani Sharnomoyee of Cassimbazar in Bengal, and of other celebrated and pious Hindu widows are and will for ever be cherished and gratefully remembered by the people ; and it would be idle, in the face of universal suffrages of men and approbation of the public and of the State, to regard the past rich gifts, donations, dedications, and so forth, as so many deliberate acts of waste that could be controverted by the next of kin. But it should be remembered that the current incomes and

Current incomes and expenses by female heirs ; charities.

Inherited moveables

Current income.

savings stand on a peculiar and a different footing from any other kind of moveable estate inherited by a Hindu widow. The Privy Council has indeed held, as we have seen already, that so far as her powers of alienation are concerned, there is no distinction between the moveable and the immoveable estate inherited by a widow. The Indian Courts have accordingly changed their former views and annulled improper alienations of the inherited moveable properties of all sorts. But though the current and the accumulated profits are not immoveable estate, they are seldom treated as accretions to the parent estate belonging to the category of the inherited moveables. In *Sami Natha Pillai v. Manikka Sami Pillai* I. L. R., 22 Mad., 356, the Hindu widow obtained a decree for mesne profits against the next reversioner who had wrongfully withheld her estate. The decree was assigned by her to a stranger. After her death, the reversioner, judgment-debtor, opposed the

assignee's right to execute the decree which he obviously thought lapsed in his favour or rather devolved on him after her death. This contention was over-ruled by the courts. The principle relied on was that if she could dispose of the profits as they accrued at her pleasure, there was nothing to prevent her to make a valid assignment of the decree for the mesne profits. The learned judges of the High Court have not at all discussed the point. It was not considered by them that they were handling a very extreme case and a highly controvertial subject. It does not appear from the report, which is unsatisfactorily brief, whether the widow, having been kept out of the estate wrongly by the reversioner, alienated the decree for any legal necessity. If she did so, the ruling is intelligible and perhaps good law. If, inspite of the adverse withholding, she was otherwise in easy circumstances, and sued the trespasser to restore the estate with all its benefits, the restoration of the whole would naturally enure for her life time, and it would hardly be in her power to defeat the claim of the next heir by alienating the fruits of her decree to a stranger. But there are other cases of acquisitions by the widow which are unconnected with legal necessity. Her acquisitions with the aid of inherited incomes have been considered above. But her self-acquisitions stand on a quite different footing. In this connection the following observations of Dr. Mitra<sup>1</sup> deserve quotation :—

Woman's self acquisitions.

"If it is acquired by the widow from the income of her husband's property, it becomes an accumulation or increment to that property, and follows the *corpus* in its devolution." With respect to the incidence of legal necessity, the learned author continues "The law, therefore, that governs the alienation of the *corpus* will also govern the alienation of this kind of property. If, however, the property was acquired by the widow from other sources, it becomes her property over which she has rights of ownership, and she has absolute powers of disposing of the same in any manner she thinks proper. In this respect her powers are not limited. She possesses the same powers as an ordinary owner of property possesses over it. In a case reported in Macnaghten (2 Macnaghten page 239) the

1. Tagore Law Lectures of 1879. p. 357.

question turned upon a gift by a fisherman's widow of the whole of her self-acquired estate, consisting of immovable property, to two Brahmins. The Pandits answered that the widow having acquired some wealth by her personal exertions, and having purchased the house with such acquisitions, made a gift of the same to the Brahmins. By the gift her property over it became extinct, and on the extinction of her right, the donee's title accrued.\* The answer was put upon the authority of texts bearing on the *stridhan* property of a woman."

To arrive at a correct decision as to the nature of the acquisition by the widow, the evidence deserves scrutiny. It is a pure question of fact in each case; and the *onus* of proof will invariably depend upon the pleadings. In some early decisions, *Onus of proving self-acquisition.* this questions of *onus* was considered; and it has been laid down that where a Hindu widow makes a gift of certain property alleging that it is her *stridhan*, the burden of proving that the property is so rests on those claiming under her.<sup>1</sup> It has been similarly held that, in case of dispute with the husband's creditors, the burden is upon the wife to prove that any particular property is her *stridhan*, and that it does not belong to her husband.<sup>2</sup> In this respect the law as to burden of proof has been held to be the same as in cases of joint Hindu family property, and the earliest decision on the subject will be found in the same page of the First Volume of W. R. quoted above. "The rule of law in these cases is this:—it is a presumption of Hindu Law, arising from the *status* of Hindu society under that law, that a family of two or more brothers who are Hindus live in commensality and with joint funds; and that all property is ordinarily acquired from such funds." But when the presumption of joint property in a joint Hindu family is rebutted by production of an exclusive and separate title, the party against whom such a title is produced is bound to show that the title is not really exclusive

1. Sreemutty Chandra Monee Dossee *vs.* Joy Kissen Sirkar 1 W. R. 107.

2. George Lamb *vs.* Musst Govind Money S. D. A. R. (Beng) 1852 p. 125.

Brojo Mohan *vs.* Musst Radha W. R. (1864) 60.

and separate.<sup>1</sup> Thus, where there has been an antecedent joint estate, constituting the nucleus and the parent estate, the presumption will be the same concerning any property in the family, and the *onus* of separation is on him who pleads it.<sup>2</sup> But if a person

suing on the footing of antecedent jointness, sets up, by his own evidence, a separation and a case inconsistent with the presumption of the family remaining joint, the *onus* is shifted, and it will lie on the plaintiff to prove a separation at such a period in the family history as would entitle him to the relief he seeks.<sup>3</sup> Following this principle as to *onus* it may be argued that in the case of woman's estate, when a particular subject of alienation is in question, the plea of separate acquisition or separate property will receive a similar treatment. As in a joint family there may be commensality as well as individuality of interests, joint and separate estates—each regulated by law and principles absolutely unconnected with each other, there are similarly various classes of woman's estates governed by different principles. The subject of joint and separate estates does not belong to this Chapter, and it has been discussed so far for the sake of comparison and analogy only. It remains now to consider the various kinds of self-acquisitions and separate properties of females which have no connection, or at least very little, with the restrictions arising out of the doctrine of legal necessity.

In some early decisions noted above, the word *stridhan* has been loosely used. *Stridhan* is a compound word, *stri* Stridhan. and *dhan* meaning *woman* and *property*. The broad classification which the text writers of the present day have made of woman's estate is its treatment under two distinguishable heads; *first*, woman's separate property and self-acquisitions, and *secondly*, property inherited from the last male owner. All kinds of property which a woman may, at any time, possess can be grouped under any of these two classes and their respective subheads. Application of the doctrine of legal necessity to any kind of property which a woman may be possessed of is dependent on the nature of the

1. *Narayan v. Krishna* 8 Mad., 214.

2. *Pritkoer vs. Mahadeopershad*, 22 Cal. p 85 P.C.

3. *Ram Ghulam vs. Ram Behari* 18 Allahabad Series p. 90.



property and on the mode of its acquisition. It thus becomes necessary to consider the subject in some detail :—

We have been dealing, mainly with the property inherited by a woman from the last male owner of such property, the real estate, whether self-acquired or ancestral of that owner which a woman succeeds to, is the most important subject for the discussion of the question of legal necessity. The alienation of such property, and the necessity therefor, by the female heir is the chief question that generally comes up for decision.

It has also been seen in the preceeding pages that the current incomes, accumulations, and savings, though at the absolute disposal of the female heir, may acquire the rank of the real estate, of intended or treated in that manner, and they are certainly matters for consideration in deciding the existence of legal necessity when the alienation takes place. Inherited move-

Inherited moveables  
of female heir, settled  
point.

ables occupied, for a series of years, an anomalous position. Courts used to look upon them in the light of *stridhan* or the exclusive property of the female heir. The Privy Council decision of *Bhagwandeem Dube v. Mayna Bai*, 23 W. R., 23, has set the controversy at rest, and the previous decisions of Courts, where the mistake of regarding the inherited moveables as the woman's *peculium* had occurred, can no longer be considered as binding. The Judicial Commissioner of the Central Provinces, for instance, has held, in *Khushal v. Dalsing*, 1 C. P. L. R. p. 77, that no part of the husband's property, whether moveable or immoveable, constitutes his widow's *stridhan*, and that she has no power to alienate the same to the prejudice of her husband's heirs. The learned Judicial Commissioner followed a decision of the Calcutta High Court<sup>1</sup> which expressly followed the ruling of the Judicial Committee in *Bhagwandeem's* case, cited above ; and held that, on the authorities that now exist, the previous decision of his court in *Parmi v. Mohun Chandri*, No. 81 of 1874,<sup>2</sup> could no longer be followed.

In the face of such clear and authoritative decision by the highest tribunal in the land, it would be superfluous to refer to the

1. *Birjim v. Luchmi*, 10 Cal., 392.

2. J. C. Digest Part VIII. page 24, Ruling No. 61.

course of the earlier rulings of the Indian Courts. Some of these rulings noted below <sup>1</sup> have no longer any binding effect.

It is interesting to observe that in the Presidency of Bombay where, under the paramount doctrines of the Mitakshara read by the light of the Vyavahara Mayukha, the Courts have placed the rights of female heirs on a higher level, a Full Bench decision,<sup>2</sup> after reviewing most of the early decisions, has been passed in exact consonance with the view now adopted throughout India affirming the limited interest of the widow in the inherited moveable property. Thus, the early rulings<sup>3</sup> of the Bombay Courts,—see for instance, *Damodar v. Parama*, I. L. R. 7 Bom. 155, on the subject of the inherited moveables in the hand of the widow, are no longer in force. We have, therefore, an absolute unanimity among all the Courts of India, as regards the limited rights of the Hindu widow over the moveable properties inherited by her from her husband. Such propriety is inalienable without legal necessity.<sup>4</sup>

A daughter in the Presidency of Bombay and in the Gujrat country inherits property, whether directly from her father, or through the intervention of her widow mother, absolutely. Such property is regarded in that country, and among the people governed by the law of the Bombay school as the daughter's *stridhan*.<sup>5</sup> The devolution of such property from the daughter is to her heirs, and not to the heirs of the late full owner. The Full Bench decision, cited last, reviews all the previous rulings on the subject passed by the Bombay High Court. So the point is now set at rest as a settled question of law. It was the case of a will executed by the daughter's heir; and it being an alienation without legal necessity, the reversionary heirs of the late male owner from whom the daughter had inherited contested the disposal of the estate in that

1 3 W. R. 105; 1 Bom. H. C. R., 56; 5 W. R. 141, etc., etc.

2. *Gadadhar v. Chandrabhaga*, 17 Bom., 690.

3. *Hari Lal v. Pranvalab*—16 Bom. 229. *Bai Jamna v. Bhai*, 16 Bom. 223.

4. *Chamanlal v. Ganesh* 28 Bom. 453. *Pandhari Nath v. Govind* 32 Bom. 59.

5. *Janki v. Sundra*, 14 Bom. 612. *Madhav v. Dave*, 21 Bom. 739. *Gandhi v. Bai Jadab*, 24 Bom. 192 F. B.

manner. The contention was overruled, and the absolute interest of the alienee was declared. This is one noticeable peculiarity of law prevailing among a section of the Hindu population in India which marks a great departure in respect of the rights of a female heir inheriting the estate of a male. It has been stated elsewhere that even when an estate is joint, the widow, daughter, mother &c. of a deceased male coparcener in Bengal inherits his share, which, even in the joint-estate of the family, is alienable by her for pressing legal necessities. We have seen instances of the marriage, *sradh* etc., celebrated by the widow on the default or unwillingness on the part of the other surviving male coparceners. These legal obligations have to be performed; and they invariably are charged on the inheritance in the estate held jointly. The share of the female heir is alienable under the circumstances. This, then, is the next noticeable peculiarity which deserves carefully to be borne in mind. Thus, then, it would be conceded that the personal law of the schools to which the Mahrastra Brahmins, the Guzars, and the Bengalees who may be domiciled in the Central Provinces United Provinces, Behar, the Punjab, and elsewhere in India where the law of the Benares School has the predominating sway will mark the aforesaid peculiarities on the doctrine of legal necessities and obligations in their transactions of alienations apart from the, prevailing law of the country. The Jain populations in India

Jains. though not so numerous as the other races mentioned above, have their own governing system of law absolutely distinguishable from that of their Hindu neighbours. Ask a Jain if he is a Hindu or not; and he would not hesitate to answer affirmately. Ask him next if he believed in the efficacy of the religious ceremonies of marriage and *sradh*, and the doctrine of spiritual benefit to the soul of the deceased male owner which is the corner stone on which the theory of legal necessities is based he will stoutly deny the proposition. The Jains are really the open dissenters from the *sastric* principles of orthodox Hinduism. Their legal rights in property are regulated mostly by customs. It has been held that a sonless widow of a Sarowgi Agarwal Jain takes an absolute interest in the self-acquisitions of her husband.<sup>1</sup>

1. Dr. Mitra T. L. L. 284: *Seosing v Dakho*, 6 N. W. P. 382; affirmed in appeal 5 I.A. 87; 1 All. 688.

This broad view of the customary law of the Jains, which is a considerable departure from the ordinary Hindu law of the country, has been deduced in the ruling from the authorities that have been quoted therein. Mr. Mayne concurs in this in his summary on the subject. Whatever that be, it should be borne in mind that the aforesaid divergence of the Jain system from the accepted legal principles of the country is, as it should be, in the course of gradual disappearance. For instance, in a case<sup>1</sup> before the Allahabad High Court,—a case of the Sarowgi Agarwal Jains, the Judges, after giving full effect to the earlier decisions on the subject, have ruled that a widow of that class of people has full right of alienation in respect of the non-ancestral property of her deceased husband, but that she has no such power in respect of the property which is ancestral. On the other hand, we also find it laid down that, generally speaking, the Jains are in all respects governed by the Mitakshara law, (vide K. K. Bhattacharya's T. L. L. of 1884-85, Joint Hindu Family, p. 51; G. C. Sastri's T. L. L. of 1888, p. 453: West and Buhler, 3rd Edition pp. 157, 923n), except only in those matters wherein special custom prevails. The general applicability of Hindu law in the Jain System has been affirmed by the Bombay High Court,<sup>2</sup> following the *dictum* of the Privy Council.<sup>3</sup> The result, therefore, is that the aforesaid departure from the ordinary Hindu law in relation to the widows, can only claim the rank of customary law among the Jains. But the shifting ground of custom on which her powers over her husband's self-acquisitions, real and personal, now rest, will not, it is feared,\* endure long under the assimilating influences of the Hindu surroundings, and one can safely anticipate the time, not far distant, when the customary law of the Jain widows will receive a mould exactly similar to, perhaps identical with, the universally-recognized Hindu law on the subject. The argument is that whenever a case of alienation by a Jain widow of her husband's estate will come up, the judicial decision of the customary law of one province, of a certain tribe, class, or family of Jains, will

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1. *Shimbhu v. Gayan*, 16 All., 379

2. *Rukhal v. Chunilal*. 16 Bom., 347.

3. *Chhotayal v. Chunnolal*, L. R. 6 I. A. 15.

hardly be a safe basis for the implicit acceptance of the custom, *proved* in the decision, for the case in question. The court

The custom  
requires strict  
proof.

will subject the party pleading the custom to the severe test of proof which the memorable decision of the Privy Council <sup>1</sup> has laid down. Their Lordships have said :

—“They are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India ; but it is of the essence of special usages, modifying the ordinary law....., that they should be *ancient* and *invariable*; and it is further essential that they should be established to be so by *clear and unambiguous evidence*. It is *only* by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.” Uncontested alienations by a Jain widow of her husband's self-acquisitions will not be a safe guide (vide Sec. 13. Indian Evidence Act, I of 1872), and a Jain decision, not *inter-partes* will be of questionable relevancy.<sup>2</sup> Thus, adoption by a Jain widow without the permission of the husband or the consent of his kinsmen, though recognized in numerous Jain decisions, was held repugnant to the ordinary Hindu law, and the custom that was set up was held not established.<sup>3</sup> The Judges of the Madras High Court, in the case cited, tried the case as an original appeal, and threw the *onus* on the plaintiff to prove (1) that the adoption was valid and (2) that he was entitled to take under the widow's will her deceased husband's estate. The concluding para of their Lordships' decision (Best and Muttusami Ayyar J.J.) is highly instructive and pertinent to the point now under consideration. They say “Of course if she succeeds to her husband's property absolutely and has the right to dispose of it or succeed to

Jain widow's  
absolute right  
not proved.

adoption of a son to herself what some of plain- such property, would be valid. But a widow to tiff's own witnesses deny the right, *animous* on alienate such property, and defendant's witnesses are u

1. Ramalakshmi v. Sivanatha, 14 M. I. A. 570 (585); 12 B. L. R. 165.

2. Shimbhu v. Gnyanchand, 16 All., 379.

3. Peria Ammanani v. Krishnasami, 16 Mad. 182.

the point. The claim of the plaintiff, based on the adoption by, and the will of, the widow was dismissed. Thus, with respect to *Stridhan*, in its most correct and accepted sense, the technical definition of which is given by Manu and which Mr. Mayne considers as the principal definition of the term, a woman has extensive (if not absolute) power of disposal. "What was given before the nuptial fire, (*adhyagni*), what was given in token of love, and what was received from a brother, a mother, or a father, are considered as the six-fold (separate) property of a married woman".<sup>1</sup> But is every kind of property which falls within the range of this accepted definition alienable by a woman at her pleasure? Nothing very serviceable can be derived from the *Sastric* texts. The author of the *Dayabhaga*, an advanced work on Hindu Law in force in Bengal, which embodies more liberal views, in several respects, of female's powers and proprietary interest, has solved the intricate question of her powers over the *Stridhan* by arguing in a circle that *Stridhan* is the property which is absolutely at the disposal of the woman.<sup>2</sup> "This view," says Dr. Sir Gurudas Bannerjee, a late Judge of the Calcutta High Court,<sup>3</sup> "is in accordance with the prevailing notion of the Bengal school regarding property, that a power of alienation is a necessary concomitant of ownership. But this is not the view of the other schools, according to which, even male proprietors are not always held to possess absolute power of disposal over their property; and accordingly some of the schools use the term *Stridhan* in an unlimited sense applying it to all descriptions of property belonging to a woman, whatever the extent of her power of disposal over such property may be."

The learned Judge then goes into details, and points out that under the authority of Katyana and Narada, *Stridhan*, that goes under the name of *Sandayika* namely, the *ante*, and *post*, nuptial presents, or the affectionate gifts from relations are properties over which a

*Stridhan* alienable  
by her absolutely.

1. Manu, IX S. 194.

2. *Dayabhaga*, Chap. IV. Sec. 1, 18.

3. Tagore Law Lectures of 1878 on Marriage and *Stridhan*, page 322.

woman possesses absolute power of disposal. To this, however, there are the following exceptions, laid down by the sages:—

Her power is not absolute over such *Sandayika Stridhan* during the life-time of husband. This is because  
 Exceptions. the idea of joint interest of the husband and of the wife, even after the gift, is not severable from the estate. For in times of distress, the husband, under the *Sastras* as well as the custom of the country, can avail of his wife's *peculium*, though perhaps, his creditor's hand cannot reach so far. Mr. Mayne puts it rather too broadly thus "If he does not choose to avail himself of it, his creditors cannot." A case has not, as far as we have seen, yet arisen, in which a husband, with a view to defraud his creditors,

converted all his estate or his earnings into gold  
 Husband's right over *Sandayika Stridhan*. and precious stones and made a whole-sale present of them to his wife to the prejudice of his just debts. Such a transaction is obviously and intentionally fraudulent; and it is a nullity. If such a case occur, court of law and of equity would hardly help the fraudulent debtor and enable him and his converted capital to elude the creditor's grasp; because under the garb of *Sandayika Stridhan*, it is but the wealth of the debtor. In a case of Parsis in Bombay <sup>1</sup> the decision of the Court, founded on the custom of the Parsis, would compare favourably with the exact Hindu view of the question. It has been held that the valuable presents in money and ornaments made to the wife at her marriage by the husband, his parents, and relations, and all increments thereof, belong under the custom of the caste, to the husband and the wife jointly during their lives, and, on the death of either, pass absolutely to the survivor. The suit was by the husband against his deceased wife's relations, a thing very common among the Hindus. It deserves, however, to be remembered that if the contest be between the husband and the wife in relation

to the property obtained by her by gift, the nature  
 Gift by husband to wife. of the gift and of the estate is, to a large extent, the guide for a correct decision. For instance,—

(1) "Over property obtained by a woman by gift from her husband, her power is not absolute. During coverture, she has

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1. Byramjee, Jamsetjee and his wife and others, 16 Bom. p. 630.

no right to alienate such property, without perhaps, strict legal necessity; and even after the death of her husband, her right becomes absolute only over so much of such property as consists of moveables."<sup>1</sup>

(2) The next exception consists in the immoveable properties gifted to her by the husband, unless the gift is accompanied with an express power of alienation. Where such express power is reserved, she would acquire absolute power of disposal over it, whether the property is moveable or immoveable, and whether the husband is alive or dead. (3) Similarly a woman has independent and absolute ownership over her *Sandayika Stridhan* which are gifts from affectionate relations to *herself alone*. Therefore, such gifts, as well as gifts by the husband himself to his wife with express power of alienation do not, at any time, stand in need of legal necessity to empower her to alienate the estate at pleasure. But, ordinarily, immoveable property obtained by gift from the husband is held by the wife subject to his control during coverture, and is never freely alienable unless sanctioned by legal necessity. After his death the heirs of such property, determined by the rule of devolution of *Stridhan*, have the same sort of control over it that the reversioners have over the widow's estate; and any unauthorized alienation by the widow, in the one case, as in the other, would be valid only for her life-time.<sup>2</sup>

The above quoted decision of Madras was considered by a later decision<sup>3</sup> of the same High Court. It was a case of gift to the wife by her husband as *Stridhan*. It does not appear that the gift was accompanied with a power to the donee to make absolute disposal of the property as she liked. Nevertheless, the immoveable property so gifted devolved not on her son but on her own heir, the daughter. The Madras Court disapproved of the view adopted in

1. *Vira Mitrodaya* 2 W and B. 74. *Vivada Chintamani*, 261, 262; *Vyavahar Mayukha* Chap. IV. Sec. X. 8, 9, *Smriti Chandrika* Ch. IX. Sec. II, 10, 11 & 12; *Dayabhaga* Chap. IV. Sec. 1, 2, 3, *Kotarbasapa vs. Chanverova*, 10 Bom. H. C. R. p. 403. Dr. Bannerjee's *Tagore Law Lectures*, p. 333.

2. *Gangadaraiya vs. Paremeswaramma*, 5 Mad. H. C. R. p. 111.

3. *Bhujanga v. Rama Yamma* 7 Mad. 387.



Bombay,<sup>1</sup> and approved of an earlier decision<sup>2</sup> of the same High Court in thinking that such a gift could not be regarded as if it were a gift of land to a stranger who had power to alienate the same at her pleasure. We have nothing to do with the question of devolution in such cases; and need not therefore wait to enquire whether the daughter alone, or the daughter and the son equally, were entitled to succeed to the gifted *Stridhan* of immoveable property of the mother. For the latter view, see *Muthappudayan v. Ammani*, I. L. R. 21 Mad. 58. But there can be no gainsaying the fact that the widow as her husband's donee under the ordinary circumstances of gift in her favour cannot make an absolute alienation of the immoveable property without legal necessity. Even her own heir can challenge the alienation in the same way as her reversioner *qua* her husband's estate. The contrary view in I. L. R. 7 Bom., 491 has been attempted to be reconciled in consistency with the above in a later decision<sup>3</sup> of the same High Court with the remark that the female donee's absolute right depended on the express power of unrestricted enjoyment and disposal embodied in the transaction of gift.

But though under the strict *Sastric* texts, over properties obtained by a woman by gift from strangers, Exclusive property, maiden-hood and widow-hood. (by strangers, is meant others than the husband and the affectionate relations) her ownership is qualified and subject to the dominion of her lord, such gifts &c. during maidenhood and widowhood, stand on different footings. In such cases, dominion of any one else is not possible, and it would seem that her ownership over the properties thus acquired would be absolute. Similarly restrictions of legal necessity have no application to property earned by skill, personal exertions purchase from the *Stridhan* and what are called gains of science. It has been held in a case decided by the Judicial Committee<sup>4</sup> that if immoveable property is purchased by a married woman by means of money which constitutes her *Stridhan*, she is quite

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1. *Mulchand v. Bai Mancha*, 7 Bom. 491.

2. *Kotarasapa v. Chanverova*, 10 Bom. H. C. R. 403.

3. *Matilal v. Ratilal*, 21 Bom., 170.

4. *Luchmun vs. Kallichurn*, 19 W. R., 292 P. C.

competent to transfer it by sale. It would, of course, make no difference if the purchase is made during widowhood. Such property is barely the conversion of her *Stridhan* from one form to another.

A mere *benami* transfer in favour of a woman will not make the estate transferred as her own. The practice of *benami* purchase is very widely known in India. It is notorious in the Presidency of Bengal. There is always an ulterior motive for this sort of dealing. Generally the motive is fraudulent; that is, to defeat a claim that may be made on the property. Though it is settled view of Courts,<sup>1</sup> up to the Privy Council, that as between the *benamidar* and the true owner the secret understanding may be revealed or the fraudulent plot may be laid bare and exposed before the court of law and equity, and the true state of ownership may be disclosed, yet there may occur questions of estoppel when third parties have been induced to act on the faith of the true owner's representations. Under such circumstances, it is apprehended, the true owner as well as the reversioner after him will be debarred from impugning the validity of the transactions.<sup>2</sup> The Bombay High Court has discussed the question on the analogical ground of a transaction that had been consented to by the reversioner.<sup>3</sup> In the Bombay case, it was the plaintiff's father who in a way represented that the widow Radhabai had authority to sell the land. The money that was raised by the sale was utilized for the marriage of the plaintiff's father. The plaintiff was the outcome of that marriage. The consenting reversioner was the late owner's sister's son, who has a heritable right in the Presidency of Bombay.

We will revert to the subject of self-acquisitions of women. A somewhat detailed consideration is necessary; because in respect of disposals of such properties, the questions of legal necessity or otherwise do not arise. Personal estate may also be acquired by a woman in various other ways. She may find a property; she may

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1. Bykunt Nath v Goboollah 24 W. R. 391. P. C.

Ram Saran v. M. Pran Peary 15 W. R., 14 P. C.

2. Sarat v. Gopal, 16 Cal. 148. On appeal Sarat v. Gopal, 20 Cal. 296. P. C.

3. Vinayak v. Govind 25 Bom. 129.

acquire a property by her own adverse possession and prescription by the expiry of the period of adverse withholding; she may recover a lost estate; she may acquire property by seizure (Mitak. Chap. I., Sec. 1, para 8), by unfair means, or by committing a crime. Property allotted to her by way of maintenance or purchased by her out of her maintenance funds is her own.

For these and numerous other kinds of acquisitions none can stand between herself and her alienee to question her disposing power, and the doctrine of legal necessity has no application. In this respect, the analogy of a member of a joint family, a guardian, a manager or any other fiduciary relation, owning separate or self-acquired estate is complete. Thus when partition takes place in a coparcenary the self-acquisitions of members can not be claimed to be brought to the hotch-pot. A manager's or guardian's own property is unencumbered by the restrictions of legal necessity. Similarly the separate property of a female stands exactly on the same footing. And as it would not be unreasonable to suppose that the recovery of a recoverable estate, and the acquisitions partly aided by the joint funds in a Hindu family create, at the best, on the authorities that exist, a preferentially superior claim to entitle the acquirer to a larger share,<sup>1</sup> similar acquisitions by a Hindu widow would rank as the widow's estate subject to the usual restrictions of legal necessity.

Similarly, if the purchase is not made out of her *Stridhan*, but out of the usufruct or the income of her inherited property, the qualified interest of the widow in the estate has been affirmed, as said before. In *Sheolochun v. Sahebsing*, 14 Cal., p. 387 P. C., it has been laid down that when a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. The Lords of the Privy Council followed in this

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1. *Gokuru v. Goburdhun*, 3 C. P. L. R. 41.

case, the authority of their own ruling,<sup>1</sup> and held that the widow having made no distinction between the original estate and after-purchases, the latter was inalienable by her for any purpose not justifying alienation of the former. Their Lordships held in the case reported in I. L. R., 10 Cal., p. 324 that the savings from the income do not constitute the widow's *Stridhan*.

It is next necessary to consider the nature of the property created in favour of a woman by means of gift or will. How far such property is governed by the law of legal necessity is a question of intricacy and importance. The gift or will may be by any one. But the nature and the quality of the estate acquired will indicate the governing clue for the application of the doctrine of legal necessity.

It has been said above, that all sorts of *Saudayika Stridhan*, whether moveable or immoveable, which are gifts from relations to a married woman, are absolutely her property; and the same kind of *Stridhan* of moveable property gifted by her husband is absolutely her own. So also is the property acquired or purchased with such *Stridhan* is at her absolute disposal. The Privy Council ruling, *Lachman v. Kallicharan*, 19 W. R. 292, is a clear authority on the point.

The aforesaid ruling affords an instance of estoppel in cases of this sort. It has been held that if the husband did during his life time, whenever called upon, make a representation on the subject, represent and induce a rational belief that certain property was his wife's, the purchaser from her could not, after his death, be equitably turned out of the estate by his heirs. The said heirs would be as much bound by the transaction as the owner himself, if the husband had been alive. One dealing with limited rights cannot acquire an absolute interest if the contesting party on the adverse side successfully to plead estoppel in the manner noticed above. There may, perhaps, be no estoppel between the husband and wife. An express and open *benami* arrangement communicated

1. *Isridut vs. Hunsbutti* 10 Cal. 324.

to the wife by her husband strongly implies an understanding contrary to the rational belief which is essential to give rise to estoppel. The word *benami* has the above meaning in all the case-law on the subject which abounds mostly in Bengal. But if the understanding created is *bona fide* and true, evidenced by the word of mouth or by deed, the woman becomes the absolute master of the estate.<sup>1</sup> In the second case noted below, the husband executed a will in his wife's favour in the following terms:—"I give, devise, and bequeathe unto my wife and her heirs and assigns for ever, all my real and personal estates and effects &c." The Court held that an absolute interest was created. On the other hand, a gift of a house by a son to his mother by way of provision for her maintenance was held by the Bombay High Court not to create an absolute estate of inheritance unaffected by the doctrine of legal necessity.<sup>2</sup> Instances may be multiplied with further quotations, but the result of the decisions clearly is that whether the grant be a gift *inter vivos* or a devise *post mortem*, unless there are express terms indicating an absolute estate or conferring a heritable right or a

General gift or devise. power of alienation, the widow takes the ordinary qualified estate. A general gift of property by the husband to the wife, creates, *qua* immoveable property thus gifted, a qualified estate. A general devise has the same

Absolute estate as to moveables gifted and devised by husband effect. In either case, however, she will have an absolute dominion over the moveable property given or devised.<sup>3</sup> This *dictum* in the

Calcutta case cited has been laid down a little too broadly with reference to what has been already said as to the nature of the property acquired by a wife under her husband's gift or devise. It is apprehended that the nature of the estate acquired, even in moveables, is dependent on the expressed *intention* of the donor or the testator.<sup>4</sup> The distinction drawn by the learned Judges between

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1. Jeewan v. Mt. Sona, 1 N. W. P. H. C 66. Tarucknath v. Prosonna 19 W. R. 48.

2. Annajee v. Chandra 17 Bom., 503

3. Koonj Behari v Prem Chand 5. C L. R., 561

4. Moulvi Mohamed v Shewakram 2. I. A., 7.

A doubtful ruling of  
the Calcutta High Court.

moveable and immoveable properties, in this respect is more like an *obiter*. In the same volume,<sup>1</sup> the principle has been still more broadly laid down in interpreting a general devise in favour of a married woman. It can hardly be understood that the intention to give a share to a married woman along with the male members as evidenced in a clause of the will created an absolute interest in favour of the married woman. Not a single precedent has been quoted in the judgment in support of this view. The respondent was not represented before the High Court; and Mr. Phillips the learned counsel for the appellant cited no authority for his view which the Court adopted.<sup>2</sup>

Important principles  
on the Subject. An important decision<sup>3</sup> has been passed by Mr. Stanley Ismay, Judicial Commissioner, Central Provinces, which having reviewed many early decisions

Gift or devise to  
daughter and to widow  
distinguished

bearing on the questions now under consideration has laid down the most correct and authoritative views in the serial order in which the arguments on the case, directly and analogically, were pressed on him. The case before the learned Judicial Commissioner was much narrower than the decision itself. It was a devise of immoveable property by a father to his daughter, who, after the devise, gifted the estate to a stranger and died. The daughter's son, as a reversioner, disputed the alienation by gift and questioned his mother's right to do so. The subject of devise and gift to women generally was considered, and the principles deduced and summed up have been laid down thus by the learned Judge:—

(1). As no part of her husband's estate moveable and immoveable to which a Hindu widow succeeds by inheritance is her *Stridhan*;<sup>4</sup> similarly, a daughter inheriting from her father stands in precisely the same position and acquires what is called the widow's estate.<sup>5</sup>

1, Chunder Money v. Hurry Doss, 5. C. L. R. p., 557.

2. But See Janki v. Bhairon, 19 All., 133.

3. Doulat Modi v. Nand Lal, 9 C. P. L. R., 95.

4. Bhagwandeon v. Maynabye, 9 W. R., 23 P. C.

5. Chhotayla v. Chhaunoolal, VI. I. A., 15.

(2). A gift or a devise to a wife by her husband of real estate will convey a widow's estate only, unless it is accompanied with an intention clearly expressed in the deed creating an absolute estate.<sup>1</sup> Such an intention must either be expressed or strongly implied beyond doubt.—Vide *Panda v. Musst. Sond.* 1. N. W. P. 6; *Tarruck v. Prosonno*, 19. W. R., 48; *Kollany v. Buchmee* 24 W. R., 395; *Kanhia v. Mahin*, 10 I. L. R., All., 495; *Bhufang v. Ramayamna*, I. L. R., 7 Mad., 387.

(3). A devise or gift by an affectionate father to his daughter, of immoveable property (moveables, of course, same) will be presumed to be for her exclusive benefit; and for the benefit of her heirs, —the ordinary intention of a Hindu, in such a case, is to make a provision for his daughter. This is the reverse of what takes place in the case of a widow. In *Ramasame v. Papayya*, I. L. R. 16 Mad., 466, similar presumption was made in favour of a mother: and the son's suit against his mother's donee was dismissed. Speaking generally, and following the authorities as they now stand, the two converse propositions have received considerable currency in our Indian Courts namely, the devise or gift in favour of the wife will create limited interest, that is, ordinary widow's estate in her favour, unless an absolute estate is conferred expressly and unmistakeably. But the same will ordinarily be construed to be an absolute estate to the daughter, unless the contrary intention is inferable.<sup>2</sup> But this cannot be said of the other classes of Hindu females, mother, sister &c., &c. It appears from the cases that with respect to the other females the intention has to be gathered from the terms of the grant. Thus, if a gift by a son to his mother showed that it was in the nature of a maintenance grant, the mother had no absolute interest to disregard the restrictions of legal

1. *Lachman v. Kallicharan*, 19. W. R. 292; *Kullammal v. Kuppu*, 1 Mad. H. C. R. 22; *Venkata v. Venkata*, 2 Mad., 333; *Damodhar v. Purmandas*, 7 Bom., 133; *Shrinia v. Puran*, 5 All., 310; *Kunj v. Premchund*, 5 Cal., 685; *Lakshmi v. Hira*, 11 Bom., 69, 573; &c., &c.

2. *Sitarau v. Vitla*, 21 Mad., 425; *Lalla Ramjivan v. Dalkoer*, 24 Cal., 406; *Harichan*, 22 Bom., 209; *Kamaraju v. Venkataratnam*, 20 Mad., 293.

word made—owning, rendered, &c.

necessity.<sup>1</sup> In these cases, the widow and the mother stand on a quite different footing from that of the daughter, sister, or any other *asagotra* woman. A grant to the former presumes the intention not to sever the subject-matter of the grant from the family. For the latter class of women, it is meant to be detached for being given for ever to a different line or family. The daughters and sisters are themselves *given* away by marriage. The Hindu marriage means the ceremony of *Kanyā-Dan*, a gift of the maiden. The instrument of gift or devise ought to be examined from this socialistic point of view in order to realize its true intention.

The next point for consideration is the nature of interest created in favour of a woman,—widow, daughter, mother &c.—by virtue of a partition or as a family arrangement under which the woman gets a share of the estate. In *Ganput v. Ramchander*, I. L. R. 11 All., 296, the facts were that between the widow on one hand and the surviving coparceners of her husband on the other, an amicable arrangement was effected whereby the widow was given a house in settlement which recited that the house was her own. She gifted the house ;—in other words, alienated it without any legal necessity. After her death the gift was annulled by the reversioners, i. e., the surviving coparceners. It was held that no more than an ordinary widow's estate was created.<sup>2</sup> As a further illustration of the distinctive features between the estates created in favour of widows and mothers and those in favour of the cognate females, referred to in the foregoing paragraph, there is a decision<sup>3</sup> of the High Court of Madras. The widow and the mother of a landed proprietor who died without issue divided the estate between themselves. The mother sold her share obviously without any legal necessity. The widow, as survivor representing the entire estate, sued to recover the share from the vendee, alleging that the allotment between the widows was an arrangement for peaceful enjoyment only. There was a deed evidencing the separation ; and its wording lent some support for the

1. *Annaji v. Chandrabai*, 17 Bom., 503.

2. *Sremutty Rabutty v. Sibchander*, 6. M. I. A. 1.

*Dina v. Gopal*, 8. C. L. R. 57.

3. *Chandrabai v. Sundara*, 20 Mad., 459.



contention that the shares were absolute properties of the ladies in lieu of all their respective claims. The Madras Court were at great pains to come to a rational understanding of the intentions of the drawers of the deed. The trouble was, it is submitted, perfectly needless and misplaced. It was not an instrument executed by the late full male owner. The estate was the widow's estate in its inception. The mother had only a claim for maintenance and support. Parties like these, that is, widows, and agnatic females of all classes, mothers, aunts &c — may find the strongest possible words and expressions for their amicable deed of partition or separation with shares to express absolute ownerships; and they may deal with their estates, for the time being, in that manner. But the paramount and the governing rule prevails that in spite of such temporary severance, the unity of ownership remains with full right of survivorship. It is needless to say, the claim was decreed in the Madras case under consideration.

Next, as to the cases of several widows, daughters, mothers, &c., having a joint estate by inheritance. If by mutual consent, amicable deed, or decree of Court they are placed in separate possession of the estate, their several possessions are looked upon as joint with strong ties of the rule of survivorship. In this respect, the estate of two or more sisters and daughters is quite similar to that of several widows.<sup>1</sup> But in cases of alienation by any of them the validity of such alienation depends not merely on the legal necessity therefor, but the tie of survivorship and of the unity of ownership imposes the additional fetter of the consent or concurrence of her rival holders and sharers. That is to say, a clear and established need of one to dispose of her share or any part of it will still require the consent of the other or others to support the alienation and to make the transferee's title free from doubt.<sup>2</sup> "Even with such consent," says Dr. T. N. Mitra in his T. L. L., p., 276, "one widow cannot alienate her share so as to convey a good title in the absence of legal necessity." *Ariyaputri v. Alamelu*, I. L. R., 11 Mad., 304, is a

1. *Mustt. Chunder v. Murat Sing*, 7 C. P. L. R., 153

2. *Bhagwandeon v. Mynabai*, 9 W. R., 23 P. C.

case of mortgage executed with the consent of both the widows; and it comprized the shares of both. The equity of redemption consequently remained jointly and severally vested in them. In execution of decree against one of them, the entire equity of redemption was sold. The case, therefore, was of compulsory alienation under the pressure of a Court's decree. The paramount principle of survivorship which would have annulled the alienation of the equity of redemption, if it had been a private conveyance, had clearly no

application in this case under the decision of the Privy Council in *Deen Dyal Lal v. Jag-deep Narain Sing*, I. L. R., 3 Cal., p. 198. But

there are some observations in the judgment of the Madras case cited above, "which do not seem to be quite in harmony with the *dictum* of their Lordships of the Privy Council<sup>1</sup> that 'there can be no alienation by one without the consent of the other.' But the Privy Council judgment does not appear to have been before the minds of the learned Judges of the Madras High Court, and of course, in a case of difference, the former must prevail."—Observations of Mr. Stevens, Judicial Commissioner, C. P. in *Mt. Chander v. Murat Sing &c.*, 7 C. P. L. R., 153 (pp. 154-155). The learned Judicial Commissioner of the Central Provinces dealt with a case of two daughters succeeding to their father's estate. There is no difference in this respect between co-widows and females of any other class jointly inheriting the property of a deceased male. It does not appear from the report whether the sale by one sister was for any *legal necessity*, so far as she was concerned. But the transaction was set aside *in toto* on the sole ground that the alienation of one sister was *without the consent* of the other. What would

have been the result of the case if the sale though unconsented to by the other sister had been for pressing legal necessity, so far as the vendor-sister was concerned? The idea of jointness or unity of ownership, though of divided possession, among or between female heirs repels the notion of the fully justified legal necessity if one only of the sharer is in need. That, I apprehend, is the underlying principle why the additional condition of consent

Compulsory alienation under decree excepted.

Legal necessity in addition to consent necessary.

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1. Bhagwandeon Dube's Case, 2. M. I. A., 487.

of the other co-heiress has legally been imposed by the case-law on the subject for alienation with legal necessity. But in the Province

of Bengal, the rule, stated above, is somewhat  
Bengal excepted. different. There, the widows, or for the matter,

other classes of female heirs possess larger powers.<sup>1</sup> It appears that if the co-widows effect partition, and one of them disposes of her share, the alienee acquires, at all events, her life-estate.

The above quoted F. B. Ruling of the Calcutta High Court, and the recent well-considered decision<sup>2</sup> of a Division Bench of the same Court are ample authority for the proposition that, so far as the Presidency of Bengal is concerned, a co-

Partition between co-heiresses. Alienation of share: consent. Legal necessity. heiress is legally entitled to sue for partition of the estate which they jointly inherit. Courts governed by the doctrines of the Mitakshara school hesitate<sup>3</sup> to accept the principle of absolute right to claim partition on the part of the co-heiress. The Madras case just cited holds that according to the views prevailing, at least under the Mitakshara doctrines, there could not be *any* kind of partition between two co-widows jointly inheriting their husband's property. This undoubtedly is saying too much. The Calcutta F. B. Case has expressly dissented from that view;—see I. L. R., 9 Cal., 580 (586). The early Calcutta decision,<sup>4</sup> referred to in I. L. R., 31 Cal., 214 (p. 218) which lays down that it is discretionary with the Court to order a partition at the suit of the widow, has, it appears, been approved. That is to say, it has been conceded, even in Bengal, that on equitable grounds partition in such cases may be refused. A later decision<sup>5</sup> of Madras has approved of the principle laid down in the earlier decision of the same High Court, reported in Vol. 2, p. 194, in so far that partition cannot be claimed to enure beyond the term of the natural life of the claimant-widow, and that the partitioned estates must be looked upon as one, and effected for quiet and peaceful maintenance of the ladies, whose

1. *Janki v. Mathuranath*, 9 Cal., 580 F. B.

2. *Durga Nath v. Chintamani*, 31 Cal., 214.

3. *Kathapira Mual v. Venkabal*, 2 Mad., 194.

4. *Soudaminy v. Jogesh*, 2 Cal., 262

5. *Ramak Kal v. Rama Sami*, 22 Mad., 522 (p. 524).

coparcenary interests remain intact. If, therefore, during the course of temporary severance of interests, alienations are made by one widow of the estate in her possession for her own pressing needs, such alienations can, at best, 'enure for her life-time. In the Madras case there was a clear compact between the ladies that each would be the independent owner of her share. An arrangement like this is not uncommon. See the analogous case of several daughters,—*Kailash v. Kashi*, I. L. R., 24 Cal., 339.

But the tenancy-in-common among the several co-heiresses can not, by any fiction of law or theory or by the terms of the closest and strongest compact, be reduced to estates in severalty, for the simple reason that the right of survivorship is paramount in such cases under the principles of Hindu Law itself, which, in this respect, is considered obligatory by the Dayabhaga as well as by the Mitakshara.

The question of alienation by any one of such female heirs under the pressure of any sort of legal necessity recognized by law is clogged with this paramount right of survivorship *inter partes*. Naturally this right gave rise to the necessity of consent as the *sine qua non* for the validity of an alienation. But the point is, that such consent may estop the consenting co-heiress: but will it go so far as to bind the ultimate reversioner to the estate? None of the aforesaid rulings have gone so far as that. I am, however, bound to answer the question: and the only intelligible answer that I will venture to give is this, that if the consent of the co-heiresses be founded on valid and strict legal necessity affecting the entire inheritance, there is no reason why an absolute interest will not pass.

With reference to the subject we are now considering,—estates-in-common of the female heirs, the demand of legal necessity is more pressing than consent. For example, in a case<sup>1</sup> of the District of Purneah in the Bengal Presidency, which went up as far as the Privy Council, the parties do not appear to be governed by the Dayabhaga School; it was a case of two co-widows who fought between themselves and eventually compromised their disputes by a *vazinama* which was

1. Dharam Chand v. Bhawani, 25 Cal., 189, P. C.

embodied in the decree, in accordance with the terms of which, one widow Saraswaty got a ten-anna, and the other Bhawani got a six-anna share of the inheritance. Each in her share, as far as their agreement could declare, was to have a complete proprietary right. But neither the agreement nor the decree embodying the same could confer on the widows higher proprietary right than what they possessed between themselves. One of the widows executed mortgages for loans alleged for saving the estate by payment of public charges, revenue &c. After her death, and after the other widow became entitled to her share by the right of survivorship, the lender sued to enforce the lien for the repayment of the debt. The creditor failed, because "there was nothing to shew, that at the time these sums were borrowed, there was no money in the coffer; or what had become of the large amount Saraswaty had admittedly received upon the death of their husband"; and secondly because there was no enquiry on the plaintiff's part into the necessity for the loan. Both these points having been decided against the creditor their Lordships did not think it necessary to go into the other question, namely, whether the widow Saraswaty was competent to mortgage the estate independently of the other widow's consent.

In the Central Provinces of India, the periodical Settlements of landed estates give rise to questions of acquisitions of estates which deserve Females' their acquisitions under heritable rights. C. P. Settlements consideration. Grants of proprietary rights were made in almost all the Districts in the Central Provinces at the commencement of the British Rule. Subsequently, there were, and there would be, recognitions of those grants at the successive periodical Settlements in the Provinces, as those settlements are made or renewed. In a C. P. case,<sup>1</sup> two daughters got the proprietary award in consideration of their father's antecedent rights in the village. They partitioned the estate, and one of them mortgaged her share. The reversioner sued for the cancellation of the alienation, because it had not the support of legal necessity. It is suggested that the other daughter had the primary and superior

1. *Narain v. Mt. Rewa*, 6 C. P. L. R. 154. See also *Nilkant Rao v. Tukaram*, 8 C. P. L. R. 102, but see *Rampershad, v. Anandilal*, 13 C. P. L. R. 81 (88).

right to come to the court first. The C. P. law on the subject lays down.—Section 87, Act XVIII of 1881—“The

C. P. periodical  
settlement Widow's  
rights, award at any such settlement of proprietary

rights in land to a widow shall be deemed to confer on her those\* rights only which, in accordance with the personal law to which she is subject, she would enjoy in land inherited by her from her husband”—Thus we have got for the Central Provinces a series of rulings of the Court of the Judicial Commissioner at Nagpur which lay down that the widow's estate thus created is inalienable without legal necessity.<sup>1</sup> In the second case cited, it has been held that the award of a definite share to a widow, after the death of her husband, secured in her favour a separate estate wherein her deceased husband's heir had a reversionary interest. Any unauthorized transaction connected with such estate could, therefore, be questioned on the ground of want of legal necessity. Prior to the passing of the C. P Land Revenue Act there have been a series of rulings by the successive Judicial Commissioners (representing the Court of highest appeal in the Provinces) which laid down most distinctly that the proprietary grants were “creation of the settlement.” There have also been a converse set of rulings stating that the settlement grant was not the creation of new rights, but barely the *recognition* of existing rights. A stamp of finality has now been fixed by law as well as by rulings. The settlement award is, under the general view, now looked upon in the light of a grant by the sovereign power, and the rights conferred thereby are such that even a son or a brother can advance no kind of right to claim a share or to question the dealings by the grantee with the estate, unless he can show that he was entitled to interests in the property of the same nature as those upon consideration of which the award was made. We have got again decisions showing

The consideration  
for the Settlement  
grant in C P that where the grants or the awards “have been made in consideration for past services rendered at the expense of the joint family, by way of labour, funds, or the like, such awards do not necessarily mean

1. *Prandass v Beniram*, 1 C. P. L. R. 130  
*Mutt. Dhano v. Shamlal*, 2 C. P. L. R. 99

self-acquisitions.<sup>1</sup> We have thus to look below the surface, to scrutinize the nature of the grant and of the property acquired thereunder.

With respect to the widow, however, the effect of the grant, under the express wording of the law itself, is to make it the widow's estate with the necessary incidence of legal necessity,<sup>2</sup> whether the widow is the wife, the daughter, the sister, or the mother. The Settlement Officer, it has been held, is not bound by the canons of strict Hindu Law in the granting of proprietary rights. In the second case, cited above, the award was made in favour of the widow while the adopted son was living but she got no more than the widow's estate. In a case from the Central Provinces that went up in appeal to the Privy Council,<sup>3</sup> the nature of interest which the widow and the mother acquired under the settlement was fully discussed. The learned counsel for the appellant, Mr. F. W. Dillon of the Nagpur Bar, argued the case before their Lordships, and tried to distinguish the award in that case from the provisions of sec. 87 of the C. P. Land Revenue Act of 1881, and contended that it was an absolute estate that was conferred at the settlement, and was consequently an estate unfettered by the restrictions of legal necessity. The Lords of the Privy Council, though they did not expressly, refer to the language of sec. 87 of the Act, considered the effect of the settlement award, and, agreeing with the Court below, decreed the reversioner's claim which was grounded on the want of legal necessity,—a question of fact found by the Judicial Commissioner. Their Lordships observed:—"But it is now said that this widow, Ganga, had something different from the widow's estate; that the effect of an order of the Settlement Officer in the month of July, 1865, was not to give to the three widows, who then were living, the widow's

1. *Musst. Poona v. Rao Nilpat*, 2 C. P. L. R. 133.  
*Dadu & Dadi v. Raja*, 2 C. P. L. R. 118.  
*Musst. Mankwar v. Pyarelal*, 3 C. P. L. R. 105.  
*Tulsiram v. Girdhari*, 3 C. P. L. R. 109.  
*Kesorao v. Krishnaje*, 4 C. P. L. R. 159.  
*Rodee v. Ganpati*, 6 C. P. L. R. 40.

2. *Narainsing v. Mutt*, Rewa 6 C. P. L. R., 154.  
*Nilkant v. Tukaram*, 8 C. P. L. R. 102.

3. *Munnalal v. Gajraj Sing*, 17 Cal., 246.

estate, but it was an order effecting a partition of the family, and giving one-fourth in absolute proprietorship to each of the three widows and the remaining share to the mother of the deceased Ratansing. There may be words in the order about which there is some ambiguity ; but reading the order as a whole, their Lordships cannot doubt that the Settlement Officer took Ratansing as being the proprietor of the estate, and took the estate as having passed to his heirs upon his death. Why he attributed a fourth share to the mother of Ratansing does not appear, but no doubt she was entitled to maintenance, and it may have been that the state of things before him at the time led him to believe that it would be a proper way of dealing with the estate to give to each of the four who had claims upon it the enjoyment of one-fourth of the estate. That may be so, but their Lordships cannot find upon the face of this order any intention to give to the mother and the widows between them anything more than an interest in the widow's estate.

"The consequence is that Ganga, having survived the rest, takes the whole of the widow's estate in the whole property, and the inheritance is left to devolve as it may devolve by course of law. The present heirs-apparent are the plaintiffs, and therefore they are entitled to decree."

Thus, the Privy Council viewed the mother's share (one-fourth) in the same light as the widows'. All acquired the widows' estate, and the distributive grants to the several classes of widows had the same legal effect as if by an amicable arrangement, the estate of the last male owner had been partitioned among them with the mutual rights of survivorship. There is, however, this difference. Suppose the last male owner's estate had been partitioned among the several classes of women, say, (1) mother, (2) widow, (3) widowed daughter and (4) married daughter, it would be regarded as a

Departure of the settlement award from the ordinary personal law discussed.

single inheritance belonging to and devolving from the last full owner, who was, in relation to the females, the son, the husband and the father, respectively. Besides

the rule of survivorship, the course of descent would be traced to and from that male owner and no other. Whereas, if to the extent



of their shares indicated above, the awards had been made by the Settlement Officer, the grant to each widow would, by the operation of law, be looked upon as an estate inherited by her from her husband. In other words, the grant to the mother would be an estate of her own husband, the father; that to the widow, an estate of her husband, the son; that to the widowed and married daughter as if it were an estate of the son-in-law.<sup>1</sup> This is the startling view of law which the ruling quoted above seems to lay down.

With respect, to the proprietary grants made to a widow, the local law of the Central Provinces has laid down a very hard-and-fast rule. So long as the widow is a *Sagotra Sapinda*, mother, wife, brother's wife, father's brother's wife, or the like, we can understand and reconcile the scope of the law so far that it contemplates the continuity of the grant, consistently with justice, reason and propriety. The grant, it may be presumed, is invariably made by the Settlement Officer in consideration of the family rights and claims. So that, if a widow of the *Bhinnagotra Sapinda* class,—a sister, a daughter or the like, happens to be the recipient of the grant, the acquisition would, by dint of the present law, enure for the benefit of the family of her husband,—a result hardly contemplated by or justifiable under the canons of the law to which the original family of the grantee was subject.<sup>2</sup> Not only that, the grant

No absolute right of widow at Settlements or there-after

might be made to a widow, *Sagotra* or *Bhinnagotra*, in return for her personal services. The acquisition might be made by her in one or some of those modes under which a woman gains self-acquired property. Yet the law would have it, that the property would be deemed to be "land inherited by her from her husband." Much conflict of rulings have occurred in the Central Provinces over the question of the proprietary grants to the females at the time of the settlement. It is no business of ours to try to notice them all to reconcile or to group them. It would serve our purposes if we indicate that the Privy Council decision<sup>3</sup> of a case from the Jubal-pore District in the Central Provinces has practically over-ruled

1. *Narain Sing v. Mt. Rewa*, 6 C. P. L. R. 154.

2. *Rampershad v. Anandilal*, 13 C. P. L. R. 81 dissents from 6 C. P. L. R. 154.

3. *Rewa Prasad v. Deo Dutta*, L. R. 27 I. A. 39.

(See 13 C. P. L. R. p. 81 Ref. p. 93.—para 2) many decisions of the Judicial Commissioners at Nagpur regarding the rights of females acquired at the settlements of the Central Provinces. In the Privy Council case, the proprietary rights had been conferred on a widow. Their Lordships held that the grant for her life-time was in the nature of a maintenance grant. Their Lordships refrained from deciding the question of the reversionary interests. Thus we are, at the present moment, in the same position as we were before the passing of the C. P. Land Revenue Act. Because we cannot say that the effect of the award to a female is necessarily to make the grant her separate property: nor can it be held that the rights conferred on a Hindu widow devolve necessarily upon the heirs of her husband. The character of the property as an inherited estate is not altered in any way: and in case of a female grantee we have to see who should be deemed to have been the last full owner. The finality of the award itself cannot be questioned on the sole ground that the devolution of the property is against the Hindu Law.<sup>1</sup>

In a subsequent decision<sup>2</sup> passed by Mr. Robert Obbard, Judicial Commissioner of Nagpur, the plaintiffs claimed some villages, as the reversionary heirs on the death of their mother, Rukhma Bai. The alienation of the villages had been effected, *first* by execution-sale in pursuance of a decree against the said Mt. Rukhma, and *secondly* under deeds of mortgage executed by her. The ground of action was laid on the want of legal necessity for the alienations. The facts of the case were, that Rukhma had a predeceased sister who had jointly succeeded and obtained the villages in dispute from their mother, Bakhat Koer, on whom the proprietary rights in the villages were conferred at the Settlement. The question arose whether by the grant, Bakhat Koer got an absolute interest in the villages, as if they were her *stridhan*, or she had them as the widow's estate,—and so controlled, so far as she and her daughter Rukhma were concerned, by the restrictions of legal necessities for the alienations in dispute. As regards the contention

Widow's Rights independent of the settlement award.

1. Mt. Janki v. Pusa, 14 C. P. L. R. 94.

2. Ramcharan v. Jagannath, 12 C. P. L. R. 143.

that the villages were held by Bakhat Koer as her *stridhan*, the learned Judge disposed of the question, holding, that by descent the estate ceased to be *stridhan* in the hand of Rukhmabai. It was found as a fact that no case of necessity was made out, so far as the mortgages by Bakhat Koer were concerned. But the Judge disregarded as incorrect the contention that the villages were held as widow's estate by dint of the operation of the C. P. Land Revenue Act. The case was remanded for further enquiry to find what rights the widow had *otherwise* than through the award; and the ultimate result of the case was made to depend on that finding. The most correct view of the matter has been laid down by Mr. Stanley Ismay in *Nilkanth Rao v. Sambhoo*, 2 N. L. R., p. 1. The learned Judge has observed. "I entirely agree with the view taken by this Court in *Ramcharan v. Jagannath*<sup>1</sup> to the effect that an award of proprietary rights which gives a widow estate cannot take away from her or be deemed to have taken away from her rights obtained otherwise than through the award already possessed by her. And the converse is equally true. As explained by this court in *Rampershad Tewari v. Anandilal*,<sup>2</sup> no rights new and not pre-existent were created by the award of proprietary rights. If an estate was self-acquired in the hands of a man, it remained self-acquired; if it was *stridhan* in the hands of a woman, it continues to be *stridhan*. The effect of the award was to make an estate heritable and alienable. But these new incidents of tenure were only to be enjoyed side by side with any restrictions imposed by the personal law of the holder. When any question arises as to the devolution of the property, or as to the power of alienation it is necessary to go behind the grant and to see what was the position of the grantee prior to the award. The mere fact that under the terms of the award the estate became clothed for the first time with the incidents of heritability and transferability did not constitute the grantee a new stock of descent or operate to vest in him or her an unrestricted power of alienation."

This is the final and the most correct exposition of the law on the subject. A contrary view of the Judicial Commissioner, Oudh,

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1. XII C. P. L. R., 143.

2. XIII C. P. L. R. 81.

was not endorsed by the Privy Council. After confiscation the government assigned some revenue-paying lands to the widow and her children in defined shares. The Judicial Commissioner of Oudh held<sup>1</sup> that an absolute estate was created by the grant in favour of the widow and her children as joint owners. The matter went up to the Privy Council. Their Lordships refrained from deciding the question remarking that "it is unnecessary to determine whether the Government did intend to give life interests only or absolute interests. The plaintiff must recover upon the strength of his own title." "There is no rule of Hindu law that a gift to a female should only carry with it the limited nature of a female's estate by inheritance,"<sup>2</sup> nor the converse.

Oudh and Madras view,  
Government Settlements

The course of decisions in the Presidency of Madras is to show that service lands, or the like, enfranchised by Government in favour of the widow who is in possession at the time of the Government-grant, created in her favour an absolute estate which is alienable by her at her pleasure.<sup>3</sup> The governing principle for the decision of such cases has been held to be, that the land when enfranchised is at the disposal of Government, and alienable or conferrable to whomsoever the Government pleases. Even in Madras, however, the pre-existing rights of the family and of the late holder, in consideration of which the grant to the widow is effected, have also been considered to supply a clue as to the nature of the estate created in her favour.<sup>4</sup> In *Narayan v. Chengalamma*, 1 L. R., 10 Mad., 1, the daughter and her minor son sued for the usual declaration that the alienations by the widow were void beyond her life. After the widow's husband's death which took place in 1860, the grant was made to the widow in 1865 in consideration of the services previously rendered and which were discontinued in

1. *Narpat v. Mahomed*, 11 Cal., 1 P. C.

2. *Mt Kollany v. Lutchmee*, 24 W.R., 395. *Pubitra v. Damoodhur*, *Ibid*, 397.

3. *Dharani Pragada v. Kadambari*, 21 Mad., 47. *Salemma v. Lutchmana*, 21 Mad., 100. *Vankata v. Rama*, 8 Mad., 249 F. B.

4. *Gunnaiyan v. Kamakchi Ayyar*, 26 Mad., 330 (350). *Boddupalli v. Secretary of State*, 27 Mad., 16.

1866. The terms of the grant indicated that an absolute estate was created in her favour. But the clause was held to be controlled by the intention of the grantor which was to substitute the estate in lieu of services discontinued. This view of the matter is quite in accord with the law in force in the Central Provinces considered in the preceding pages, where, the governing rule of interpretation is the consideration of the Settlement Officer on the footing of which the rights have been conferred. The Madras Court, in the above case, held accordingly, that a qualified estate was acquired by the widow, and that the plaintiffs,—her daughter and the latter's son, were entitled to sue for the declaration. Another contention raised and decided in the above case is to the effect that the

The daughter's son can sue with his mother, making up full ownership by reversion.

daughter's son was entitled to join in the action as co-plaintiff. It was held, following the view of the *Sivaganga* case (I. L. R. 3 Mad., p. 331) that like the widow, the daughter takes under the Mitakshara law but a qualified heritage, and that though, for the time being, she represents the complete reversionary inheritance, her succession is but a case of interposition between the last full male owner and his nearest male *Sapinda* with prospective full ownership. The two plaintiffs together represented the full ownership by the right of reversion, and were entitled to sue.

The above view of the widow's rights under the Government grant is not in accord with the current of rulings in the Presidency of Madras. In one case,<sup>1</sup> the above ruling<sup>2</sup> has been considered not quite in accord with an earlier Full Bench decision<sup>3</sup> which was not referred to in the case reported in the 10th volume; and a later decision<sup>4</sup> of the same court has also proceeded on the rule laid down in the Full Bench case. This, then, is the light in which the right of the female under the Government grant in the Presidency of Madras has been considered; and there can be no doubt

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1. *Dharani Pragada v. Kadambari*, 21 Mad., 47.

2. *Narayana v. Chengalamma*, 10 Mad., 1.

3. *Venkata v. Rama*, 8 Mad., 249.

4. *Venkatarayadu v. Venkataramayya*, 15 Mad., 284.

that the acquisition of rights under a grant to a female should, as a matter of general principle, be decided with exact reference to the wishes and the intentions of the grantor. It needs mention that the divergent and the stereotyped view of the matter under the C. P. law with respect to proprietary grant to a Hindu widow under the Settlements effected before the passing of the Act XVIII of 1881, is entirely one-sided. But the grants under the Settlements that may be effected subsequent to 1881 are and would be entirely untrammelled by such special legislation.

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## CHAPTER III.

### Reversioners Generally.

The Hindu female who owns estate for life, and has not the absolute interest therein, has always a person in whom the contingent future interest in the property is vested. Technically, that is called the reversionary interest; and the Reversioner. interest-holder is called the reversioner.

“Those who take the property after the widow's death are called reversioners; and the interest which they possess in the estate during the continuance of the widow's estate is called reversion.”<sup>1</sup> In the strict legal sense, reversioner is the person (one, or several of the same class), who at the particular moment of time is the heir of the last owner (male or female), on the supposition that the life-incumbent for the time being is *then* dead. In any other view of the matter, if we look beyond the lifetime of the life-holder, no particular individual can be called the reversioner in contemplation of the former's death; because none can say who in the meantime would live or die. Such prospective heirs are all called reversioners. But it is the immediate reversioner, *i.e.*, the reversioner defined as above, who alone is concerned or interested in the questions relating to the principle of legal necessities in the transactions of the life-interest holder. This is the settled view of the rulings. The language of Article 125, Schedule II of the Limitation Act, XV of 1877, and III (e) to Sec. 42, Act I of 1877 show that this is also the view of law. But there are circumstances under which the remoter reversioner can, and is at times bound to, sue. In an early Privy Council Case,<sup>2</sup> their Lordships, after laying down the fundamental rule that the right of suit on behalf of prospective and contingent owners should be restricted and not liberally encouraged, observed:—“If the nearest reversionary heir refuses, without sufficient cause, to

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1. Tagore Law Lectures of 1879 by Dr. Mitra, page 361.

Rani Anund *vs.* The Court of Wards; 6 Cal., 764.

institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue." In such a case, the plaint must state the circumstances under which the more distant reversionary heir claims to sue. The court must then exercise a judicial discretion in determining whether the remoter reversioner is entitled to sue, and would probably require the next reversioner to be made a party to the suit. In the case cited the presumptive reversionary heir has been defined by their Lordships to be "the person who would succeed if the widow were to die at that moment." The above-quoted decision of the Privy Council has followed the rule laid down in an early Bombay decision, *Bhickajee vs. Jagannath*, 10 Bom. H. C. R., 351, and also in *Koer Golabsing vs. Rao Kurun Sing*, 14. M. I. A., 193. The same view has been followed in a case before the High Court of Bombay.<sup>1</sup> Where therefore, there is no evidence of collusion or connivance, and none of the circumstances necessary to be stated and proved to entitle a more distant reversioner to come in exist, a remote reversioner is not competent to maintain the suit. The bare fact that the interposing presumptive reversionary heir has only a woman's estate burdened with the restrictions of legal necessity is considered no ground to justify the action.<sup>2</sup> This view has been followed by the High Court of Madras, with an observation, that the nearer reversioners must be impleaded, and that, even if their actual fraud is not proved, it is sufficient to let in the remoter reversioner if the elements indicated in the Privy Council judgment noted above appear or exist.<sup>3</sup>

The next question is what rights and remedies have the reversioners got to control the actions of the female heir in possession? It used at one time to be thought that as the next reversioner was precluded from ousting the female heir, he could claim to have

1. *Ramabai vs. Rangrav*, 19 Bom., 614.

2. *Ishwar vs. Janki*, 15 All., 132. *Balgovind vs. Ramkumar*, 6 All., 431. *Madari vs. Malki*, 6 All., 428.

3. *Gurulingaswami vs. Ramlakshamma*, 18 Mad., 53.



it declared, as against the widow, that he would be the owner of the estate after her death. It has been repeatedly ruled that such an action does not lie; because the plaintiff might not live to be the heir, or survive the female heir.<sup>1</sup> The courts of law and equity have in course of time, and after long controversies in favour and against such actions, sanctioned a course of litigation and a form of suit by the reversioner,—not to encourage fruitless or speculative litigations, but with the view to save from future danger the reversionary estate and to benefit the reversion. The remedies prescribed are of two kinds. One, a declaratory action during the life-time of the woman: and the second, a claim for possession of the estate from the alienee after her death. In the former kind of action, the woman and the alienee are primarily the necessary parties; and in the latter, only the alienee.

Reversioner's suit,  
parties.

In both these classes of actions, want of legal necessity is the basis of the suit. But as the woman during her life time fully represents the estate, and is its owner, *de facto* and *de jure*, the first class of suit is necessarily one for a bare declaration of right without any kind of consequential relief. Such suits, as far as the legislation in this country goes were originally based upon the provisions of Section 15, Act VIII of 1859. But that section of the old Procedure Code presented a very anomalous reading, and gave rise to a huge mass of conflicting rulings. Their Lordships of the Privy Council, in the celebrated case of *Kathama Natchiyer vs. Dorasing Tever, L. R. 2. I. A., 169*, noted above, laid down the true meaning and construction of the section. Later cases have followed the same view,<sup>2</sup> and prepared the ground for subsequent legislation which will be considered hereafter. The main principles inculcated in the above precedents may be summed up thus:—

(1) Although the reversioner's interest during the life-time of the woman is future and contingent, yet suits to restrain her from

1. *Natchier v. Dora Singa Teor* 2. I. A. 169 15 B. L. R. 83: 23 W. R. 314. *Greeman v. Wahari*, 8 Cal., 12.

2. *Sadut Ali vs. Khajah Abdul Guny*, 11 B.L.R., 203. *Shreenaraian vs. Kissen*, 11. B.L.R., 171. *Hunsbuti Koerain vs. Ishri Dutt Koer*, 4 C. L. R., 511.

acts of waste and improper alienation form a very special class, and are cognizable by the courts *ex necessitate rei*.

(2) A declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same court, or, in certain cases, in some other court.

(3) A declaratory decree shall not be passed if consequential relief is capable of being had *then*.

(4) Such a declaratory relief is not a matter of absolute right. It is entirely discretionary with the court to grant it or not. In every case sound and judicial discretion should be exercised ; and care must be taken to avoid harassing and vexatious litigation ; and declaratory suit should not be allowed to be converted into a new and mischievous source of litigation.

These principles anticipated, as it were, Section 42 of the Specific Relief Act I of 1877. The Section runs thus,—“ Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief ;

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

To the above section have been appended Illustrations : and one of them has expressly authorized the presumptive reversioner to sue, to wit.

“*Illustration (e)*—The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity, and was therefore void beyond the widow’s life-time.”

This, then, is the direct legislative sanction for the nature of suit which the presumptive reversioner may

**Bare declaration.**

bring. The relief claimable is only for a declaration that a particular alienation being without legal necessity is void beyond the widow's life-time. It follows therefore, from the text of the law itself, deduced from the general principles of Hindu Law, that none but the presumptive heir can bring the action. But we have seen, however, that a remoter reversioner can sue; and that by *stating* and *proving* circumstances which have been clearly set forth in the rulings noticed already, and also by impleading the necessary parties. But the time of action is precisely what has been indicated in the Illus-

**No claim for immediate cancellation maintainable.**

tration (e) quoted above. The reversioner has no right to sue for the immediate cancellation of the alienation; the alienation being valid and unimpeachable even without legal necessity during the life-time of the widow. The reversioner has no existing right to the estate to question the validity of the alienation during the life-time of the widow. He has no cause of action to sue for the present cancellation of the deed of transfer. A suit brought on that basis cannot be permitted to be treated as a suit for the usual declaration. Such a change of pleading was not permitted by Mr. Stevens, Judicial Commissioner of the Central Provinces, in an unreported case.<sup>1</sup>

The next question is, what are the advantages or the benefits of such a declaratory action, brought in anticipation of the widow's death? This matter every reversioner has to consider, for his own sake, before he brings his suit. It may possibly be, that the plaintiff or his heirs may not exist to derive any ulterior benefit; because, the actual and the ultimate heir at the time of the widow's death is quite unknown. Experience shows that improper alienations are more frequently made during the earlier stages of widowhood, and that the Hindu widows are proverbially a long-lived race of people. The plaintiff in such a case goes barely for a chance to get the estate in the end. He should

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1. *Bhau v. Totaram*, decided on 21. 9. 92.

remember that he was embarking on an expensive and sometimes very troublesome litigation, probably for the luxury of satisfying a grudge, or in the hope of soon getting the estate. He ought to know it well that the decree, if he succeeded to get one, would lead to no immediate relief, and the ulterior benefit of his decree neither he nor his heirs may live to enjoy. But though these and other similar matters require his consideration, there are, on the other hand, reasons for him to believe that the declaration is not quite barren ; that it is pregnant with valuable potential benefit for his own succession in expectancy. He thinks it prudent to get the estate freed from the burdens created by the widow if the alienation is really improper and therefore void beyond her life. He thinks it advisable as well as desirable to bring his suit immediately after the transaction. The act of alienation being recent, all the available evidence are fresh and easily available for a decision which may tend to pave the way for a quiet and undisturbed succession in future.

In the generality of cases only those reversioners bring the action who, as past experience shows, by themselves or through their heirs and representatives, reap the ulterior benefit. If the successful litigant does not survive the widow, his heirs derive the advantages from the result. Instances are

Declaratory decree  
eventually beneficial.

rare in which, a perfect stranger or a remoter reversioner of a different line or descent, without having contributed either his labour or his money for obtaining the decree, enjoyed at the expense of others the fruits of litigation. In majority of instances, the decree goes for the benefit of the successful reversioner and his line. He obtains the decree, and there the matter ends. Such a decree, of course, is

Declaratory decree  
incapable of execution

Finality.

not one capable of execution. It can hardly be said that a decree of this sort can come within the purview of Sec. 266 or under any known provision of the old Civil Procedure Code. It is not possible to apply for the execution of such decree in the form and with the formalities laid down by Sec. 235 of the old Code. The decree is passed and it remains like a complete relief and a final adjudication. If, on the other hand, the immediate presumptive

heir fails, and the widow or her alienee or both prove the existence of legal necessity, and the relief sought is refused, the adjudication is to all intents and purposes final. The whole line of heirs, representing the reversion, would be bound by the decision. Why and how this is so, I proceed to consider. The point arises in this way. A reversioner sues for the usual declaratory relief, and a decision of some kind is passed; the question is, does the decision bind only the parties to the suit, or is it binding on the estate in suit and the entire line in reversion? By *reversion* I mean the interest which all the classes, degrees, and series of reversioners, presumptive or prospective, near or remote, possess in the widow's estate. While the expression *widow's estate*, would mean and imply the single interest which the widow possesses during the whole course of her widowhood, the word *reversioner*, on the other hand, would imply and include the whole and unbroken line of heirs who, during the continuance of the widow's estate, would lay claim to the property on the hypothesis that the widow is dead as well as when she actually dies. During the widow's lifetime, one presumptive heir dies, and he is immediately succeeded by another, and on the latter's death, a third appears, and so on: and thus, phoenix-like in the mythological fable, there is an unbroken continuity of the reversionary heirs up to the moment of the widow's death. Therefore, the question resolves itself into this:—If a reversioner, A, sues the widow and

Effect of declaratory decree.

her alienee,—always a necessary party,—for a declaratory decree that a particular alienation is void beyond her life time, for want of legal necessity, and obtains the declaration, does the decree enure for the benefit of all the reversioners, say B, C, D, and E, and therefore, of the heir, say E, who actually inherits the property on the widow's death? and, if the reversioner A fails in the suit, does the adverse decision estop E in his subsequent attempt to recover the estate from the widow's alienee, when he actually succeeds as an heir? The questions are by no means easy, and we shall presently see how far law and authority have settled the points. Mr. Mayne, in his work on *Hindu Law and usage*, (7th Edition, para 652) observes:—"It was formerly unsettled how far a decree in a declaratory suit would

bind any but the parties to it. Where a suit is brought by or against a female heiress in possession, in respect of any matter which strikes at the root of her title to the property, it is held that a decree, fairly and properly obtained against her, binds all the reversioners, because she completely represents the estate." The learned commentator then quotes a series of rulings which appear as footnote in the page where the above passage occurs, and winds up his observations by quoting Sec. 43 of the

Act I of 1877, Specific Relief Act (I of 1877) which says that Sec. 43.

"a declaration made under Chap. VI is binding only upon the parties to the suit" and "persons claiming *under*<sup>1</sup> them respectively." It would appear, however, from the summary of the rulings made by Mr. Mayne that they relate to the suits against her by third persons, and the principle laid down is what effect the results of such suits would have upon the reversion.

The broader question formulated above has not been discussed or dealt with. One point, however, is clear, that to secure the binding result in such cases upon the reversion, the decree must have been fairly and properly obtained against the widow. Section 43 of the Specific Relief Act (I of 1877) is, unfortunately, a brief *placitum*; and it can hardly be said that it gives a clear clue to the full and intelligible answer to the questions raised. The decision, it is said by the section, in the first instance, is binding on the parties to the suit. So far it is quite clear. It is held also binding on persons claiming *through* them respectively. Are we to understand that each successive individual reversioner claims *through* his predecessor on the line of reversion, or does not the claim of each individual reversioner stand independently on its own footing, viz, the proximity of relationship to the deceased owner whose estate was inherited by the widow? If the latter is the real standpoint to indicate the rights of each reversioner, then the question remains,

Sec. 11, Code of Civil Procedure and Sec. 43, Specific Relief Act compared.

who are meant by the "persons claiming *through them* respectively." The law of estoppel by judgment is embodied in Section 11 of the Code of Civil Procedure,

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1. The words in Sec. 43 is "*through them*" & not "*under them*."

where the corresponding expression used is "between parties *under whom* they or any of them claim." But it can never be contended under the Code that a decision between parties will operate as a bar between others who do not occupy representative or derivative *status* in relation to the previous litigants. Leaving, however, the broad question of *res judicata* enunciated by Section 11 of the Code of Civil Procedure as quite beyond the scope of this work, we are bound to notice the difference in language between the wording of Sec. 11 of the Code and those of Sec. 43 of the Specific Relief Act. Speaking generally, the contending parties within the purview of Section 11 of the Code are either the parties themselves or their heirs or representatives marshalled in opposite sides, between whom, a decision passed has its binding effect. They cannot wage the same contest again. In such simple and elementary aspect, the principle of *res judicata* enunciated by Section 43, Act I of 1877 is clearly intelligible. But in tripartite matters contemplated by that section, in which the widow, her alienee, and the reversioner, are involved, if, for an improper alienation, a judgment is passed either in favour or against a reversioner in a suit between him on one part, and the widow and her alienee on the other; or, if in a suit or contest between the widow and her alienee, a certain decision is given, will the decision in either case bind the reversioner (who may be a different person) who actually is otherwise entitled to the estate on the widow's death? Again, will a decision passed at the instance of one reversioner estop succeeding reversioners from raising the same question, though it is true that none of the reversioners derives his title from his predecessor on the line? For a satisfactory answer to this question Section 43 of the Specific Relief Act of 1877 supplies very scanty materials. The decisions that have been passed on the subject have made up the deficiency, and we proceed at once to sum up the principles, laid down so far as our present purposes are concerned. It has been held that the widow fully represents the estate, and that the immediate heir or the presumptive reversioner is the absolute heir expectant and represents the reversion; that if the widow is the *tenant-in-tail*, the reversionary heirs are, in the language of Sir Barnes Peacock in a Full Bench Case<sup>1</sup>, like

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1. Nobin Chunder *vs.* Issurchunder, 9 W.R., 505.

the *issues-in-tail*. The above-quoted Full Bench decision is one of the earliest authoritative rulings that have laid down, that the reversionary heirs are bound by decrees obtained against the widow without fraud or collusion; and that they are also bound by limitation, by which, she, without fraud or collusion, is bound. In a subsequent case before the Privy Council<sup>1</sup> the Judicial Committee have observed (p. 17): "The judgment in *Nobin Chunder Chuckerbatty vs. Gurupersad Dass*, 9 W.R. 505, quoted by the High Court, is not directly applicable to the present case. It is referred to in the judgment of this Committee in *Amritlal Bose vs. Rajaneekant Mitter*, 15 B. L. R. 10 (19), where it is said that the rule there laid down is correct." It can hardly be contended that the principle enunciated in the celebrated *Shiva Ganga* case and also in the case reported in 9 W.R. 505 would only apply when the suit is by or against a member of the same family. There is no valid ground for such a distinction. Because in the Privy Council judgment reported in I. L. R., 21 Cal., p. 80 the unsuccessful litigation by a daughter was held to be a bar to a similar action by her son. In *Mt. Bani vs. Mt. Sita*, 9 C. P. L. R., p. 59, the Judicial Commissioner of the Central Provinces, after considering the principles of the *Shiva Ganga* case, and the case in I. L. R., 21 Cal., 80, has held that the doctrine of *res judicata* applied, in all fours, to both these converse propositions. In a later case<sup>2</sup> again before the Privy Council,<sup>3</sup> it has been decided that there was no authority whatever for the contention that although a previous decision might be a bar against the son and all persons claiming under him, the effect was only to extinguish their rights, and to let in and to keep open those of others claiming as reversionary heirs. The same principles have been recognized in the earlier rulings of the Judicial Committee from the time of *Shiva Ganga's* case up to a recent time.<sup>3</sup> Thus, succeeding heirs are bound by a decree obtained against the female heir, provided of course, as each of

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1. *Harinath Chatterjee vs. Mothur Mohun*, 21 Cal., 8, P. C.

2. *Luchman Kunwar vs. Manorath Ram*, 22 Cal., 445.

3. *Jugalkishore vs. Jotendra Mohan Tagore*, 10 Cal., 985 P. C.  
*Pertab Narain vs. Trilokinath*, 11 Cal., 186 P. C.



the precedents has laid down, there was no element of fraud or collusion in the matter of the Court's adjudication. Therefore, if in answer to a reversioner's suit, a previous decision, in which another reversioner was concerned, is set up, the latter will stand a bar to the new claim, unless the plaintiff proves unfairness, collusion, fraud, or the like, in avoidance of the previous judgment.

The *onus*, of course, of proving the exceptional ground will lie on the plaintiff. If such special ground is made out, the suit of the plaintiff proceeds just on the same principle, and for the same reasons, which, as we have seen, entitle a remoter reversioner to step in and sue the female heiress in possession to restrain her from acts of improper alienation. Otherwise, a valid and *bona fide* decision, whether allowing or disallowing the right claimed, would bind all persons claiming in succession to the female heiress.<sup>1</sup> Such a decision, then, is a judgment *in rem*, as distinguished from a judgment *inter partes*, or *in personam*. On this subject, the observations of Mr. Justice Collett, in reference to Section 43, Specific Relief Act, deserve careful consideration:—"I will only point out that the illustration to the section has been well-chosen to draw attention to the distinction between a judgment *inter partes* and *in rem*. The latter kind of judgment being a judicial declaration concerning the *status* of either a particular person or thing, which operates accordingly to confer the *status* adjudicated upon, rendering the fact what the court adjudicates to be of universal effect, concluding thereafter all persons; but a distinction is very wide between a judgment of this kind, and a judgment in a case in which a question is whether a particular *status* as to a person or thing existed or not. This is a judgment purely *inter partes* which can be conclusive only in subsequent litigation regarding the same subject-matter, upon the same ground of action and between the same parties or their privies."<sup>2</sup> Section 43 Act I of 1877 enunciates a

1. *Arunachala vs. Panchanandam*, 8 Mad., 348, per Sir Charles Turner, C. J.

2. Collett on Specific Relief Act, page 232.

leading principle of the doctrine of *res judicata*, and seems to have been added by way of precaution, since the rule would have been applicable though not expressed. See Mr. Nelson's commentaries on Act I of 1877, Section 43.

A decision contemplated by section 43, Act I of 1877 bears a close resemblance to the judgments enumerated in Act I of 1872, Section 41 of the Indian Evidence Act which are illustrations of what Austin calls *things of universal application* (*jus-a thing, in rem-general*ity). As familiar illustrations, we may refer to matrimonial decisions, that is, decrees declaring divorce or nullity of marriages which put an end to the relationship of husband and wife; and the decree declaring the validity of a marriage establishing or restituting conjugal rights. Such decrees extinguish or establish, as the case may be, the relationship of the litigants against the rest of the world. Similarly, a grant of probate or of administration actually invests the executor or administrator with a character and a *status* which are conclusive against mankind.<sup>1</sup> An adoption decree, perhaps, has the same effect. For instance, a decision, one way or the other, in a suit on adoption between the presumptive heir on one hand, and the other parties interested in the adoption on the other, would be *prima facie* binding on the reversion. This view of the matter is favoured by the judgment in *Gyanendra vs. Labango*, 11 C. L. R. 198. A judgment *in rem*, then, is of universal application and conclusive against the whole world, and a judgment *in personam* is one which is binding only between parties and those claiming through them:—*Caspersz' Estoppel*, page 14, para 3.

Section 43, Act I of 1877 bears some resemblance to Explanation VI to Sec. 11 of the C. P. Code, which relates to a *bona fide* litigation in respect of a common right, and lays down the doctrine that the litigants as well as the persons interested shall be deemed to have claimed. As illustrations for the application of Expl. VI, we may refer to *Madhavan vs. Kechavan*, 11 L. R. 11 Mad. 191, where one of five trustees in whom certain property was vested had sued, and the result was held to bind all the trustees. But if father and

1. *Girishchunder vs. Broughton*, 14 Cal., 861.

one brother only were sued, and the nature of the suit and the decree indicated that the suit was not one of a representative

character, the result was held not to bind another brother, whose title independently of the father, rested on the ground that the property

Reversioner's suit  
when *res judicata*.

was ancestral.<sup>1</sup> Similarly, if the preceding reversioner had sued not the alienee of the widow, but his father and mother, he was not precluded by the previous action from suing the alienee. "As however Khusal was not a party to that suit, the question as between him and Dalsing cannot be said to have been decided, for he claims in his own right, and not through his father or his mother."<sup>2</sup>

It would appear from a decision of the Privy Council that the full scope of a reversioner's previous action must be closely scrutinized, the judgment of the case, and not merely the decree that was

Remote reversioner's  
suit, not binding.

passed, the pleadings and the array of parties must be examined in order to see whether it had been a complete representative action binding on the reversion.<sup>3</sup> A remoter reversioner's action, behind the back of the immediate or the nearest reversioner, is not only not tenable but the decision of the case is also quite in-operative, if inadvertently the suit is allowed to proceed. The most usual class of such suits are 'by distant cognate or agnate male reversioners against the widows in collusion with their daughters. True, the daughters, except in Bombay, have no more than the widow's estate for themselves. Yet they cannot be ignored, nor can the litigation be carried on behind their back. It is only by the suffrage of case-law on the subject that the remoter reversioner is granted an indulgent hearing when he sues to protect the reversionary interest. But the indulgence, as we have seen already, is always conditional on circumstances and special pleadings affecting the next reversioner which must be made clear in the proceedings. For this purpose, the final decree that is passed is not the sole and the safe guide. The Privy Council case, just quoted, is clear authority for the

*Res judicata* : see  
judgment also.

1. Ramnaraian vs. Bisheshar, 10 All., 411.
2. Khusal &c. vs. Dalsing &c. 1 C. P. L. R., 77.
3. Sri Raja Rau vs. Sri Raja Inuganti, 21 Mad., 344, P. C.

point that we must liberally refer to the *judgment* in the case in order to see whether the interests of the parties marshalled in the decree on opposite sides have been fully represented. Not only is the remoter reversioner out of court so far as the legislation in the country goes,—see Illustrations under Sec. 42, Act I of 1877 and Article 125, Act XV of 1877, but he is also non-plussed if the nearest reversioner, specially if he be a male representing the full prospective ownership, or a daughter with male children, is a consent-

ing party to the alienation by the widow and *vice versa*.

which is sought to be impeached for want of legal necessity. Collusion cannot be mistaken for consent: and fair consent cannot be called collusion. The remoter reversioner, therefore, has to steer the course of his litigation free from these shoals for his own success as well as for making the result binding on the reversionary heirs during the life and after the death of the widow.

On one hand, there is the possibility of far-reaching consequences of a fair suit and a fair trial of a reversioner's action, on the other hand, it is only his personal remedy of uncertain and precarious benefit to himself that the reversioner seeks to enforce. If he dies while his suit is pending, will his suit abate? and will it not be in the power of the next reversioners to step in and carry on the litigation? It is true that the right to sue survives only in favour of the legal representative of the deceased plaintiff. But each reversionary heir, must, I suppose, be considered to stand on the shoes of his immediate predecessor. Such being the case, it is difficult to conceive how on the death of the reversioner, who claims to protect the reversionary interest, the right to sue should abate. We have it in the decision<sup>1</sup> of a Full Bench, of the Allahabad High Court the real principle on the subject laid down in the following significant words:—"After judgment the action does not abate, but the benefit of the judgment goes to the real representative of the person obtaining it." Following the principle of this ruling, it must be held that the representative action of the nearest reversioner who seeks to protect the interest of

Reversioner's Suit, Personal remedy, Abatement.

<sup>1</sup> Muhammad Husain vs. Khushal Ali. 131.

the reversion must survive to perpetuate the benefit which the action is contemplated to secure. Such being the case, it is hardly conceivable how, on the death of the nearest reversioner suing his right would entirely abate, and the cause of action would again be available for the next reversioner to reagitate for the same relief.

In *Balak Puri v. Durga* I. L. R., 30 All. p. 49., a maiden daughter sued to redeem the mortgage which had been executed by her deceased father. She died pending the action and after the record of the pleadings. Her married sister Durga applied to have her name substituted in place of the deceased plaintiff and to continue the action. This was granted by the Court of first instance; and the usual redemption decree was passed in favour of Durga. On the Defendant's appeal to the High Court the learned Judges discharged the decree on the ground that on the death of the original plaintiff her cause of action did not survive. In other words, it has been ruled by the Allahabad Court that on the death of the maiden daughter who inherited the estate of her deceased father and instituted a suit to recover a portion of her inheritance, her right to sue abated.

The learned Judges have considered that as the plaintiff (daughter) was suing for her personal remedy, her death extinguished that remedy.

I. L. R., 30 All.  
49 doubted.

This ruling does not appear to be consistent with an early decision<sup>1</sup> of a Division Bench of the High Court of Calcutta, which seems to lay down what appears to me to be the correct view of Hindu law on the subject. It cannot possibly be doubted that the plaintiff in the Allahabad Case was the holder of her father's estate for life and that *Mt. Durga* was the next reversioner. It could not be said that the maiden daughter in the Allahabad case was absolutely entitled to the property. To all intents and purposes, she held what is usually called as the widow's estate. It would be very revolutionary if the law be that the Hindu widow's suit, however *bonafide* or necessary, would abate on her death. We have it as a settled point of law that a *bonafide* dealing of the estate by Hindu widow and the result of a *bonafide* litigation by or against her have binding consequences on the reversion. If such be the

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<sup>1</sup> *Mt. Parbutty v. Mt. Higgin* 17 W. R. 475.

case it would be anomalous to hold that a properly instituted action of hers would end with her death. If a widow alienates property, and a suit is filed in her life-time to impeach the alienation and for possession on the ground that the widow was not competent to alienate coparcenary estate; that is to say, if the plaintiffs sued as the coparceners of the deceased husband of the widow and the suit failed because it was found that the deceased was a divided member and owner of his own estate which his widow could alienate for valid legal necessity, it seems clear that an action for the usual declaration in her life-time, or for possession on her death will not be barred as *res judicata*. The subsequent action would be based on reversionary title decided in the previous suit that was based on the coparcenary title. Similarly, there can hardly be any doubt that if the previous suit had been brought against the widow herself on the alleged right of survivorship, and if the suit failed for want of evidence of coparcenary, the result would not operate as a bar to any kind of action based on the reversionary title. But, curiously enough, the Bombay High Court has held,<sup>1</sup> on a very broad reading of the Expl. II, Sec. 13 C. P. Code, that a previous action based on the right of survivorship would preclude the subsequent action based on the reversionary right. It is suggested that an alternative action should have been brought. This view, has been dissented from by the Madras High Court in *Ramaswami v. Vythinatha*, I.L.R., 26 Mad., 760 (p. 779). It has been rightly pointed out in the Madras case that the two rights, one by survivorship, and the second by reversion spring from totally different causes of action. These are independent titles founded on independent conditions of things. It is never a rule of law that a plaintiff is always bound to unite in the same suit his causes of action in the alternative, as stated in the Bombay ruling.

Reversionary interest.  
*Spes Successionis*.

The right of the presumptive reversionary heir, under the Hindu Law is no more than an expectancy of succession. It is not transferable by reason of the law laid down in Section 6 of the Transfer of Property Act.<sup>2</sup> Equivocal statements made by such successors in

Sec. 6 Act IV of 1882.

<sup>1</sup> Guddappa v. Tirkappa : 25 Bom. 189.

<sup>2</sup> Manicram v. Ramalinga 29 Mad. 120.

Narasinhham v. Madavarayula 13 Mad. L. J. 323.

expectancy at the periodical settlements, if such settlements are made or are repeated, period after period, with a Hindu widow, do not lead to the conclusion that an absolute interest was created in her favour. The ancestors of the plaintiff who set up their claim as the reversioners<sup>1</sup> after the death of the widow in 1892, to set aside alienations made by her about half a century prior to the action and to recover possession, had alleged at the Settlements made with the widow that they were the reversioners. The widow had made equivocal statements from time to time. At times she alleged that the plaintiffs' ancestors were her heirs after her death; but later on, she asserted her absolute interest. The previous Settlements and the allegations of the parties then living were considered in full detail by the Privy Council. The point decided by their Lordships was that no representation, not even a contract or agreement on the part of the plaintiffs' ancestors could estop the plaintiffs from asserting their rights as the reversioners to the estate. The plaintiffs came to the court on their own right and not as heirs of their ancestors who had a *Spes Successionis*. The alienations obviously were without any legal necessity. Reversing the decision of the Allahabad High Court, the Privy Council decreed in favour of the plaintiffs.

The adopted son is not like the reversioner. A widow in possession of her husband's estate is entitled to the full enjoyment, with absolute ownership, of the income of the estate, without a word of protest on the part of the reversioner. But in relation to an adopted son, she has very restricted rights as regards the said income. In an Allahabad case,<sup>2</sup> of a sufficiently prosperous family, the income of the estate was about Rs. 8000 a year. The adopted son of the last male owner, as the report of the case shows, came out, as it were, from his hiding place, several years after she had been in possession, and ejected her by a suit. He then instituted proceedings by way of execution of decree to recover the mesne profits. The original decree contained the

<sup>1</sup> *Bahadursing v. Mohorsing* 24 All. 94 P. C.

<sup>2</sup> *Dale Kunwar v. Ambika* 25 All. 266.

direction as to the mesne profits. The case was one of doubtful adoption. But there was a final decree affirming the adoption against the widow. Under such circumstances, it was very improper that there should have been an order for mesne profits against the widow, as if she was a trespasser for all the time that she was in *bonafide* possession of her late husband's estate. For this reason, the learned Judges of the Allahabad High Court treated her case very leniently in her favour, and set off against the claim all the past expenses of her legal necessities in a very handsome style, reducing the net claim to a very small amount.

The Privy Council<sup>1</sup> considered it doubtful if it would be in all cases sound discretion to allow to the reversioner the usual declaratory relief if the widow, as such, executes a will of the estate in favour of a stranger. There is no question of legal necessity in the case of a will. The reversioner succeeds, superseding the will, when the widow dies. Ordinarily, there is hardly any difficulty to establish the reversionary *status* upon the death of the widow. In the case cited, their Lordships remarked that if they had to decide the case as a Court of the first instance, they would have hesitated to grant the declaration. Such a remark from so high an authority over the Courts of this country carries great weight. But it is a matter for serious consideration that there might crop up numerous complications if the reversioner remained quiet, awaiting the uncertain event, frequently very distant, of the widow's death. Evidence then fresh, would grow dim in time. Silence sometimes is construed into consent or acquiescence. The Courts of appeal, however high or eminent, hearing the facts of the case and the arguments from the mouths of the Counsel, do not, it is submitted, realize the full responsibilities of the Judges of the original Courts. Therefore, it is a very sound principle of law,—I may call it a point of good legal etiquette, that the discretion exercised by the Courts below is seldom reversed in appeal. This principle was followed in the case cited.—See also *Ramchandra v. Balmukund* I. L. R. 29 Bom., 71. This is a very salutary strong hold of the



original Courts in India for the independent exercise of their judicial discretion.

The declaratory relief, in such cases, is a concession of law.

The concession is meant to protect the interest of the person or persons, "who," to quote the words of a Privy Council decision,<sup>1</sup>

"may eventually turn out to be the heir or heirs: and the object of the legal proceeding is really the perpetuity of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. The reversioner actually suing does not only do so for himself, but also on behalf of all the rest." But the views expressed in some of the recent decisions of the High Courts of Madras and of Allahabad are not, to say the least of them, quite in accord with the accepted principle affirmed in the above cited decision. In *Chhidu v. Durga*, I. L. R. 22 All., 382, it has been held that in cases of successive grades of reversioners, a decision in a suit by some of such reversioners seeking to set aside alienation made by the female in possession, will not necessarily constitute a *Res-judicata* in respect of a similar suit brought by other reversioners. This decision was based on a Full Bench ruling<sup>2</sup> of the same High Court. But the latter only decides the point of law that no reversioner can claim through a preceeding or foregoing reversioner, however close or immediate; but that each reversioner stands on the foot-stool of his own right derived from his relation to the last male owner. The Allahabad F. B. case next discusses the question of limitation, and lays down obviously a debatable proposition that if one reversioner,—say the next reversioner, allows his remedy for the declaratory relief to be barred by limitation, the same limitation bar will not affect the subsequent reversioner, when his turn comes. A few days later, a Division Bench<sup>3</sup> of the same High Court has drawn a broader conclusion mainly from the aforesaid F. B. ruling. And it lays down in a short decision the astounding proposition that a decree in a suit by some of the reversioners, seeking to set aside alienations made by the female heiress in possession will not necessarily bar, as *res-judicata*,

<sup>1</sup> *Chiruvalu v. Chiruvalu* 29 Mad. 390.

<sup>2</sup> *Bhagwanta v. Sukhi* 22. All., 33 F. B.

<sup>3</sup> *Chhidu v. Durga* 22 All., 382.

a similar suit brought by the other reversioners. The report of the case is very brief : and all that appears therefrom is that the previous action was by *some of the brothers and nephews* of the late full owner for the declaration that the alienation was void beyond the life-time of the widow for want of legal necessity. The decision was against the claimants. The subsequent plaintiffs, other nephews of the deceased, were not, it was held barred by the previous decision. Apart from facts showing the non-representative character of the previous litigation, the decision, it would seem, flies at the face of the provisions of section 43 of Act I of 1877. To add, as it were, to the gravity of the situation we have got another decision<sup>1</sup> of Madras, quoted without any comment in the latest edition of O'Kinealy's Code of Civil Procedure (6th Edition, 1905) pp. 631-32, which lays down that " a right to sue as a reversioner to set aside an alienation of a Hindu widow

Section 43 Specific  
Relief Act.

is a personal right, and does not survive on the death of the plaintiff." These views, it is submitted, would read as a very strange commentary under section 43 of the Specific Relief Act.

In a decision<sup>2</sup> of the High Court of Madras it has been ruled that the right to claim declaratory relief by a reversioner arises once for all, The remoter reversioners are bound by the same law of Limitation which binds the next reversioner. The High Court has gone further than this and has laid down that the remoter reversioner is a plaintiff within the meaning of the definition of the term in the Limitation Act in relation to a claim which the next reversioner was entitled to make. Both these views appear to me to be highly questionable. I refrain however, from closely discussing this aspect of the question stated in the above ruling, because recent decisions have drawn a distinction between the rights of reversioners (near and remote) in cases of adoption by Hindu Widows and in cases of alienations by her of her deceased husband's properties. With the former we are not obviously concerned in this book. It is necessary to observe that the tendency of the recent decisions is to show that the Courts are not willing

<sup>1</sup> Sakyahani v. Bhavani 27 Mad., 588.

<sup>2</sup> Ayyardora v. Salai 24 Mad., 405.

to keep the status or the question of adoption to remain hanging or doubtful in favour of successive reversioner, or reversioners of several grades.

There is only one article in the Limitation Schedule (118) which prescribes the period of six years for claims to set aside an adoption. It does not lay down that the claim should be made by the presumptive reversioner only, in strict conformity with the language of Illustration F to section 42 Act I of 1877. I would here point out the difference in the wordings between Illustration E and Illustration F appended to section 42 Act I of 1877 and it would be seen that while article 118 of the Limitation Schedule aims to arrive at a finality on the subject of Hindu Widow's adoption, the Legislature at the same time and in the same schedule have designed to keep open the question of legal necessity of widow's alienation both before and for 12 years after her death. It would seem to follow, on reading articles 125 and 141 of the Limitation Schedule, that the Hindu widow's alienee is liable to be sued during all the time that the widow lives and for the period of twelve years after her death. In that view of the matter we are unable to reconcile I. L. R. 24 Mad., page 405 with the cases of alienations by Hindu widows. In subsequent decisions<sup>1</sup> of the Madras High Court the learned Judges have distinguished cases of adoption from cases of alienation—both in respect of limitation and in respect of the remoter reversioner's right to sue. And it has been clearly pointed out, with quotations of authorities from the very earliest time, including the decisions of their Lordships of the Privy Council that—the remoter reversioner is entitled to sue under certain conditions therein laid down, which must clearly be set forth in the pleadings. But though the lapse of time for the declaratory action during the widow's life time does not as it has been repeatedly seen stand in the way of the possessory action by the actual reversioner when the widow dies, reason, law, and equity range strongly in favour of the view that the suit of the reversioner who is the

Reversioner's suit is representative.

<sup>1</sup> Govinda v. Thayammal 28 Mad. 57. Chirunolu v Chirunolu 29 Mad. 390 F.B.

most proximate and nearest in the line of the heirs expectant is a representative one which must be deemed to exhaust the whole cause of action for the reversionary line. In the face of the discrepant views noted above<sup>1</sup> I could have felt considerable diffidence to express my own opinion so strongly on the subject. But I find a remarkable support from the decision of the Madras Full Bench already noticed—*Chiruvolu v. Chiruvolu* I. L. R. 29 Madras 390, decided on 23rd February 1906. The learned Judges have stated that an unauthorized alienation by a qualified owner, or, in other words, an alienation by a Hindu widow without legal necessity gives rise to a cause of action for a declaratory suit from the date of alienation to all the reversioners. In such

cases, there is only one cause of action to be sued upon.<sup>2</sup> Following the principle thus laid down, it would, I fear, be wrong to hold that the death of the plaintiff-reversioner would cause the suit to abate, and that there is no finality of the decision arrived at after a fair fight by the next reversioner. Referring to the Allahabad decision,—I. L. R. 22 All., 382, a Division Bench of Calcutta have held<sup>3</sup>, that the *Shebait* for the time being of an idol represents a Juridical person, and that the decision in a suit brought by one *Shebait* is binding on the succeeding *Shebait*s. There is no reason, therefore, why we should not hold that the abstract juridical rights of the reversionary interest should not be completely represented by the nearest reversioner.

If a litigation in which the limited interest holder, such as widow, daughter, sister, or the like is engaged is not pushed through in a *bona-fide* or earnest manner, and a compromise is effected before decree, such a compromise is not binding on the reversioner.<sup>3</sup> The Lords of the Privy Council have laid down in *Imrit Konwar v. Roop Narain*, 6 Cal. L. R. p. 70 at p. 81 in clear and emphatic language that "it is clear that the daughters

<sup>1</sup> *Kaverie v. Sastri*, 26 Mad 104.—The final decision in the case of next reversioner is a complete bar.

<sup>2</sup> *Tulsidas v. Bejoy Kishore* 6 Cal. W. N. 178.

<sup>3</sup> *Govind v. Khunni Lall* 29 All. 487.

could not be bound by a compromise made by the widow under any circumstances." An alienation rendered necessary by the terms of a compromise is one which the reversioner is entitled to question in the ordinary manner.

In *Gobind Sing v. Baldeo* I. L. R. 25 All., 330, the widow sold her husband's estate for consideration in part justifiable on the ground of legal necessity. The rest of the consideration was for her personal purposes. The necessary part was her late husband's debts. This was admitted by the plaintiff—reversioner. He set up in his plaint an honest case that he was prepared, while annulling the transaction, to recoup the alienee the price representing the amount of the necessary debt. The Court, following some of the early rulings<sup>1</sup> on the subject, passed an equitable decision to take effect after the death of the widow, resembling a decree

ordinarily passed, in a suit to redeem a mortgage. Avoidance of transactions by widows, guardians, managers, or the like, which have the support of legal necessity in part, and which may even be regarded as waste or as an improper alienation as to the remainder, is a point of great importance in a majority of suits that are filed by the reversioners or the heirs prior to or after the death or the fiduciary incumbency of the party whose transactions are impeached by the suits. The suits may be either declaratory or possessory. They may be by the expectant heir, or by the present owner under some kind of recognized disability for the time being. The principle to be followed for the right decision in such cases is laid down by the Privy Council in a case decided in June 1907.<sup>2</sup> A Hindu widow in possession of her husband's estate executed a deed of sale of it in favour of her late husband's creditor in 1868. The said creditor had an outstanding decree against her for Rs. 7080. The decree was passed in July 1861. The decree was silent as regards future interest. The widow was induced to add interest to the extent of Rs. 5638. Then she borrowed Rs. 7280 in cash : and

<sup>1</sup> *Phoolchand v. Raghubans* 9 W. R. 108.

*Muttee v. Gopal* 11. B. L. R. 415.

<sup>2</sup> *Deputy Commr. Kheri v. Khanjan* 29 All. 331.

thus the total consideration for sale was shown as Rs. 20000, nearly. The reversioner made in 1869 a fruitless attempt to annul the sale and to save the estate from the clutches of the purchaser. After this, the widow lived for nearly 25 years; and the purchaser was in quiet and undisturbed possession for all the time. She died in 1894. After the lapse of five more years, that is, in 1899, the reversioner brought an action against the purchaser, apparently under Art. 141 of the Limitation schedule, as if he had all along been holding the estate under a sort of equitable trust on behalf of the late widow. The previous suit by the reversioner was for pre-emption which, it may be said, virtually admitted the sale by the widow to the stranger. As it would ordinarily happen, during such a long interval of time, the purchaser sold away portions of the estate to others who were all impleaded in the reversioner's action in 1899. The defendants' contentions were; *first*, the prior pre-emption suit estopped the plaintiff; and *secondly*, the whole transaction of sale in 1868 was supported by legal necessity.

Admission of *factum*  
of sale no estoppel to  
Reversioner.

Their Lordships of the Privy Council held that the reversioner's previous action wherein virtually the sale to the purchaser was admitted in point of fact could not properly include his ground of attack against the transaction arising out of the want of legal necessity for the sale. The first plea thus failed. On the second, the findings were;—

- (a) the interest item was an improper consideration;
- (b) the cash advance, if made, was not for any legal necessity. Holding that the decree against the deceased husband was the sole item which had the sanction of legal necessity, the transaction of absolute sale by the widow had not the full support commensurate with the worth of the state. It was held that the original vendees must be supposed to have been aware of the unequal terms; so that the reversioner's claim prevailed from the moment he became an heir. Under the principles of equity, discussed with precedents already, the ruling of the Privy Council was that the reversioner was entitled to the estate, subject to his refunding the debt due by the deceased husband of the lady, less the mesne profits already enjoyed by the purchasers. These profits were far in excess of the

reasonable rate of interest which the original decree did not bear: and holding, that the said excess had more than wiped off the original decretal amount, the reversioner was awarded possession without having to bear any burden for the original sale consideration said to have been received by the widow. The aforesaid decision of the Privy Council is a typical one, passed in June 1907, of the early views on the subject which were expressed in some of the decisions in the Calcutta Weekly Reporters by the late eminent Chief Justice in Bengal, Sir Barnes Peacock. The equitable relief by way of refund in cases of inadequacy of legal necessity in reference to the property conveyed is not so widely known in the country, and it is seldom noticed in practice. We have now the most authoritative pronouncement of the Lords of the Privy Council in a case that went up in appeal from the United Provinces to the effect that under justifying grounds we can protect the inheritance of the reversioners from the burdens of unnecessary debts and encumbrances; and,

Equitable refund  
a whole-some principle.  
separating the chaff from the grain, we are able to get the inheritance restored following the principles of equitable refund apportioned to the quantity and the extent of the actual legal necessity. In the majority of cases of impeachments of alienations on the ground of want of legal necessity, the questions of fitness or proportion crop up between the actual need and the worth of property alienated. In typical or extreme cases of inadequacy of legal necessity, the courts, I apprehend, would be bound to admit the superior claims of inheritance to those of speculative alienees from the life holders. I am unable, under the present state of the authorities on the subject to draw the line between the extreme and the passable cases, and to say that in the former restitution of property with equitable refund should be ordered, and in the latter, the alienation should stand. But such a classification can never be made; and strictly speaking, it is not needed. To support an alienation by a qualified owner, proof of legal necessity for the whole

transaction is necessary. The party making out a *bonafide* case is entitled to succeed. If in a true case set up by the reversioner, the whole of the legal necessity, or the legal necessity for the whole of the consideration is not made out, the Court should not hesitate to grant the equitable relief if the reversioner seeks it.

I have not seen many cases of declaratory action involving the prayer for equitable restitution. If a woman with qualified interest in property makes an alienation for consideration, a part of which is only for legal necessity, the reversioner is, I think, entitled to ask for the usual declaration that may contain the relief for *pro tanto* restitution and restoration of the estate to the actual reversioner for the time being after the woman's death. Till she dies, the arrangement effected cannot of course be, possibly disturbed. The cases that usually come up are reversioner's claims to recover property *after the death* of the life-holder, wherein want of legal necessity in full being established the property is restored subject to the order for refund to the extent of the amount of legal necessity. The equities as to the payment of interest on the legal loan on the part of the claimant and the accountability for profits on the part of the alienee are the usual adjuncts in decrees in such cases.—Vide the recent Privy Council case noted above. To revert then to the question of declaratory action by the next reversioner during the life time of the widow, we have the earliest decision in 9 W. R. 108 *Phulchundlal v. Rughoobuns*. This is the leading case on the subject. In it the claim was instituted while the widow was alive but the claim failed because the plaint and the relief were not properly worded. The plaintiff wanted to set aside the transaction of sale as if it were a mortgage. This the High Court did not allow. Nevertheless the learned Judges considered that a suit will lie by the reversioner at once, not to set aside the transaction absolutely, but to set aside so much of it as would operate against himself. Though this judgment is often quoted as an authority in support of the proposition stated above, there occurs in the Judgment of the learned Chief Justice a passage which is not only an *obiter* but sounds like bad law. The passage

Declaratory action.  
Prayer for equitable relief.

Equitable refund in-  
terest thereon profits of  
property.



runs thus:—"They did not mean to ask that the Court declare that, upon the death of the widow, the persons, whoever they might be, who should be entitled to take by inheritance, might have the deeds set aside upon paying the amount which the widow was entitled to raise. If they had done so, they would have asked what, as it appears to me, they were not entitled to have. The Court could not properly have decreed in the lifetime of the widow that upon her death, the deeds should be set aside upon payment by the persons, who should succeed to the estate, of the amount which the widow was entitled to raise, in as much as it would be contingent upon the will of the persons who might succeed to the inheritance whether they would pay the amount or not; and the purchaser could not properly have been placed by a decree of the Court in a position in which for many years he might remain in a state of uncertainty as to whether or not he could safely expend capital in the improvement of the estate. Such a decree would have been unjust to the purchaser, and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not." The above quoted *obiter* has raised quite a sentimental difference between the two contingencies namely (1) declaratory decree soon after the transaction ordering in favour of the next reversioner the equitable relief founded on partial legal necessity and (2) actual possessory relief with the same sort of orders at the time of the widow's death. There appears to me to be no difference whatever. If the alienee remains liable to be ousted of the estate with liability to render an account thereof for all the time that the widow lived, if the suit is filed after the widow's death there is no hardship whatever if the stamp of the said liability is affixed when the transaction is fresh and the alienee has at once the notice of the hard bargain into which he has entered. This is the right view of the case as the subsequent rulings<sup>1</sup> of High Courts have clearly laid down. The view now settled may be stated thus:—Where the widow of a separated Hindu sells property

Declaration Equitable  
relief settled view.

<sup>1</sup> *Muteeram v. Gopal* 20 W. R. 187. | *Gobind Singh v. Baldeo* 25 All. 330.  
*Ramdei Kunwar v. Ahu Jafar* 27 All. 494.

belonging to the estate of her deceased husband; the sale, as to a portion of the consideration therefor, being justified by legal necessity and as to the remainder of the consideration not so justified, it is competent to the next reversioner to the estate to sue for and obtain a decree that he is entitled *after the death of the widow* to recover the property sold by her from the vendee on payment of such portion of the consideration as represented moneys borrowed by the widow for legal necessity. See also Mayne 7th Edition Page 876. Such declaratory actions, during the life time of the widow, have been affirmed by the Privy Council.<sup>1</sup>

If an alienation, challengeable by the reversioner, is one which the widow's husband had made, and she takes no step to impeach the transaction, the reversioner has right to step in, and to seek the usual declaration during the life-time of the widow.<sup>2</sup> The allegation in the case cited above was that the will executed by the late husband was a voidable transaction by reason of undue influence and coercion on the part of the legatee. But the reversioner's suit was contested on the ground that it outstripped the limits prescribed by illustrations (e) and (f) to Section 42 Act I of 1877, which authorize an action by the reversioner against the widow's alienations (nearest or the remoter as the case may be under the circumstances already explained) to impeach transactions by the widow and not by her husband. But as the widow remained quiet and thereby imperilled the estate in reversion, the court held that it was in the power of the nearest reversioner to sue for the declaration that the will did not affect the widow's estate, and therefore the reversionary estate after her death; though, it was at the same time admitted that the remoter reversioner had no right to sue for the reasons stated in the Privy Council decision, *Rani Anand v. Court of words*—I. L. R. 6 Cal 764.

In the view of a decision<sup>3</sup> passed by the Madras High Court the adopted son is not, in relation to the widow adopting him, like the reversioner. It has been held that if the widow effects an

<sup>1</sup> *Rajlukhee v. Gokool* 13 M. I. A. 209.

*Koer Goolab v. Rao Kurun* 14 M. I. A. 176.

<sup>2</sup> *Puttanna v. Rama Krishna* 30 Mad. 195.

<sup>3</sup> *Sreeramulu v. Kristamma* 26 Mad. 143.

alienation of her husband's estate for legal necessity prior to the adoption, during the currency of her widow-hood, the alienated portion of the estate is gone for ever ; and the son adopted takes the remainder by virtue of his right of adoption. In the opinion of the Court, the rights of the adopted son originate from the date of the adoption without any retrospective ownership. The widow was not the trustee ; but she held in her absolute right the widow's estate up to the date of adoption. The court refused to recognize the fictitious civil death of the widow, *qua* her estate as a Hindu widow, and the fictitious birth of the adopted son into the new family antedated from the moment of her husband's death.<sup>1</sup> It was so, argued the learned Judges, because it was perfectly optional with the widow, however peremptory the necessity therefor or however pressing the wishes of her deceased husband might have been, to adopt a son or not. Under this equitable view of the matter, the Court held that even if the widow had, prior to the adoption and in the time of her widow-hood, made an improper alienation without any legal necessity therefor, it is not in the power of the adopted son to annul the transaction while the widow is alive. The Court has not gone the length to state that a simple declaratory action by the adopted son will not lie in her lifetime of the same nature as the reversioner's suit under Article 125 of the Limitation schedule. The status and the civil rights of the adopted son stand most decidedly on a far higher level than those of the reversioner. It may be that the adopted son would be bound to sue for the declaratory relief within 6 years under

Limitation 6 years.  
Adopted Son.

the Limitation Article, 120. But if the ruling goes the length impliedly to lay down that there is absolutely no remedy available to the adopted son to impeach the prior unnecessary alienations by the widow, I would make no apology respectfully to differ from that view. It is of course arguable that the estate carved out from the inheritance by an improper alienation by the late husband of the widow does not immediately vest in the adopted son so as to entitle him to dispossess the alienee during the widow's lifetime. But it does not follow why the adopted son should not at

<sup>1</sup> Mayne's Hindu Law, 6th Ed. para 197. | West and Buhler p. p. 1151-52.  
I. L. R 19 Bom. p. p. 814-15.

once be able to impress on the transaction the stamp of invalidity during the life-time of the widow. Babu Golapchandra Shastri in his Tagore Law Lectures on Adoption, pp. 416-17, says :—"As regards unauthorized alienations, an adopted son, like the reversionary heir, is not bound by the widow's acts, and his rights cannot be prejudiced by them." The only point decided in the case is that the *bona fide* alienee is not divested of the estate received for valuable consideration by reason of the widow's adoption.

Adoption an alienation of widow's estate.

In one sense, adoption itself is an act of wholesale alienation by the widow of her estate of inheritance. The conflicting views that existed on the rights of adopted son dating back from the moment of the death of the late full owner are responsible for several anomalies in the rulings that exist. On this subject, the observations of Mr. Mayne, 6th Edn., pp. 253-54, are worth reproduction. "It must not be supposed," says the learned author, "that an adopted son would necessarily have to acquiesce in all the dealings with the estate between the death of his adoptive father and his own adoption. The validity of these acts would have to be judged of with reference to their own character, and the nature of the estate held by the person whom he supersedes. Where that person is a female, either a widow, a daughter, or a mother, her estate is limited by the usual restrictions.....These restrictions exist quite independently of the adoption. The only effect of the adoption is that the person who can question them springs into existence at once ; whereas, in the absence of adoption, he would not be ascertained till the death of the woman. If she has created an encumbrance, or made any alienations which go beyond her legal powers, the adopted son can set them aside at once. If they are within her powers, he is as much bound by them as any other reversioner would be."

Reversioner versus adopted son.

I could not find the report of any decided case of a reversioner's suit frustrated by the widow's adopting a son during the pendency of the reversioner's action against the widow trying to invalidate her wasteful alienation, that is, alienation of her deceased husband's estate without any legal necessity. Why there should not have been many decided cases on the point is more than I can

understand. The feeling of strong jealousy and antagonism which actuates the reversionary heir to contest the dealings of the Hindu widow is always reciprocated by her: and if the widow was enjoined to adopt a son by her deceased husband, she could find no better device to put the reversioner out of the way. The question for consideration is while the reversioner's suit impeaching the widow's transaction is pending, if the widow adopts, what becomes of the pending action? Does the suit abate, or does it proceed with the adopted son being impleaded as a party-defendant? And is he a necessary party for being impleaded? We have nothing to do regarding the contest now prevailing as to whether the son adopted acquires retrospective rights of ownership, or only the prospective rights; whether he occupies the position of a posthumous son under the theory of his mother's (adoptive) constructive pregnancy antedated from the moment her husband died; or whether he divests the widow of her inheritance, or, worse than the remotest contingent reversioner, he has no sort of voice in or control over the widow's mismanagement of affairs during her life-time. These discrepant views will be found discussed in Sirkar's Law of Adoption, pages 390, 395, 403 and 408 &c. and in Mayne's Hindu Law, 6th Edition, para 184, there is a quotation of an early Ruling<sup>1</sup> of the Sudder Dewany Adalat from which the learned author deduces the principle that "an adopted son would *a fortiori* divest all estates which follow that of the widow, such as the right of a daughter or a daughter's son."

The divested estates referred to in the above quotation are the estates in reversion. It had been held in a Bombay case,<sup>2</sup>

that if adoption take place *pendente lite*, the adopted son must be made a party.

Adoption supersedes reversion.

A Hindu widow sued for partition. But pending the suit, she adopted a son, and carried on the litigation in her own name. It was held that it should be assumed as a matter of law that she litigated as his guardian, and that the suit should not be dismissed solely on the technical ground that the son was not made a party;—*Dhurmdas v. Shama*, 3 M. I. A., 229; *Hari Saran v. Bhuban*, 1 L. R., 16 Cal., 40, P. C. As it is

1. *Ram Krishna v. Mt. Sreemutee*, 3 S D, 367.

2. *Rambhat v. Lakshman*, 5 Bom., 630.

therefore clear that the adopted son is a necessary party in a pending litigation concerning the estate, the contingent interest-holder, reversioner, is at once displaced, as soon as the adopted son is made a party, and his suit impeaching an alleged improper alienation by the widow should be deemed to abate. It is when *the right to sue survives* that the suit does not abate. After the adoption the reversioner can have no pretence to claim his reversionary right. In illustration (d) below section 361, old C. P. Code, if A dies having no son, and if the family were governed by the Mitakshara School of law, the right of survivorship and lapsing of estate in favour of the defendants would apparently make the partition suit abate.

If a reverter enters into a speculative and champertous bargain of his contingent right with a stranger,<sup>1</sup> to divide the profits of the spoil by suit, the transaction is invalid. The reversioners B and C sold their interest to A in properties worth nearly three lacs of rupees for considerably less their value, received a small advance, and agreed to receive the balance as the properties were recovered from the hands of the widows' alienees. The ground of action in contemplation of which the sale to A was effected was that the widows' alienations were invalid for want of legal support; that there was enough income in the hands of the widows' to have saved them from incurring debts; that the securities in their possession were good and large enough for the heavy rates of interest over their borrowings; and that the alienations, one after another, of the whole or the bulk of the estate in their hands were the outcome of wastefulness and extravagance during their tenure of widowhood which lasted nearly 18 years, when the last surviving widow died. The history of the family and the career of the widows, their estate, and their management thereof are interesting study of the ordinary aspect of the contentions of legal necessities or otherwise that arise in our courts between the reversioner and the widow's alienee. The case just cited being a decision on the First Appeal, the discussion of facts is highly instructive. It was found that the steady income from the fixed estate which the

Sale by reversioner of his right. Legal necessity.

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1. *Devi Dyal v. Bhanpretap*, 31 Cal., 433.

widows enjoyed was about Rs. 500 a month. The last male owner died indebted to the extent of a little over Rs. 7000. There were three daughters to marry after his death. Under this normal condition of things which more or less characterizes ordinary Hindu families in India when a male owner dies having some debts, and certain other liabilities, like maintenance charges, education and marriages of children, and an estate with an income thereof in the hands of a female heir,—a widow, daughter, mother or the like,—one would feel inclined to scrutinize closely the grounds of legal necessities on the pretence of which the lady-incumbent alienates her estate of inheritance. In that view of the matter the case before us is a typical example. We have here three Hindu widows, ordained by the *Sastras* to observe rigid economy in living, in the enjoyment of Rs. 500 per month as fixed income from land, with a debt of only Rs. 7000 to pay, and only three daughters to marry, gradually and leisurably within the space of 20 years. In the end, when the reversioners sued, in 1898, there had been a clean sweep of the entire estate alienated, one portion after another, in favour of some creditors who went on lending money to the widows as they wanted, charging heavy rates of interest. The ostensible purposes of the loans were payments of debts, and of renewed debts, marriage charges, and litigation expenses. On this

Equitable relief by way of refund must be asked.

short statement of facts, it would appear, that on the *prima facie* view, the chances for success of the reversioner were bright.

The Subordinate Judge who heard the case and received evidence recognized partial legal necessity to support the alienations, and passed an equitable decision decreeing the claim of reversioners subject to the condition that the legal advances were made good with reasonable compensation. This he did under the ordinary and stereotyped clause in the plaint embodying the general prayer for such further relief as the nature of the case might require. The High Court considered that a general prayer of that sort could not be construed to include the necessary and definite request for an equitable finding discriminating necessity from wastefulness: and on the merits, the plaintiffs claim was dismissed with costs. The court held that the transactions had the full support of legal necessities throughout

The court held it was a champertous bargain on the part of the reversioner that he made a speculative sale of vested reversionary interest in a manner that tended to foster gambling in litigation. Such a speculative transaction is void as unconscionable and opposed to public policy. It was a bare chance of success that was sold for a chance price. But as the reversioners-vendors were also suing as plaintiffs, the other important issues of facts were also decided by the High Court. In this case, the plaintiffs, the reversioners and their vendees, came to the court arrayed on one side against the several alienees impleaded as defendants. There was misjoinder of plaintiffs in the first instance. It was practically all over with the case as soon as it was held by the courts that the actual reversioners had sold away their right to the other plaintiff under a transaction that was held to be void. This was not a correct procedure to start with. Next the facts disclosed that a fair portion of the consideration for the alienation by the widows was litigation expenses that had been brought about by the reversioners themselves. It was not in their mouth rightly to plead in court that the alienees did not make adequate enquiries into the reasons or the necessities for the loans or the transfers of properties. They were the next-door neighbours and apparently near relations to the widows. Instead of becoming any help to the *purdah* ladies by rendering to them

Reversioner causing alienation.

counsels as regards their pecuniary transactions and management of their estates, they had hurled them headlong into protracted and distressing litigations which could not fail to be ruinous even to the well-managed estate of males. The pressing demands of courts for stamps and lawyers' fees do not wait for opportunities for raising money on convenient or easy terms as to interest. The reversioners in this case could not plead, as every reversioner coming to the court with a true and honest case should always be in a position to do, that they could assist or advise the ladies (having ample resources and securities at their disposal) to find money at a low rate of interest to meet the necessary purposes of expenditures. All these were the serious prejudices against them when they invoked the assistance of the Court of Equity to give



them relief. Here we have got, as a finding of fact, that the ladies had over two lacs worth of landed estate, yielding a monthly income of Rs. 500. A paltry debt of Rs. 7000 due by the late owner and two or three daughters to marry was not such a heavy responsibility as to make the ladies die bereft of all the estates. The current income, it is true, was at the disposal of the widows, The doctrine of legal necessity had no voice in the matter of the expenditure thereof as soon as the said income was received by them. But the economical management of the expenses in strict accordance with the traditional rules (well recognised in the country) that govern Hindu widows, would have undoubtedly saved several thousands of rupees in the course of 20 years to reduce the family debt and effect the marriages. Why should not the *Sowcars* and the alienances of the ladies be deemed to have been affected with this notice in pursuance of the well-known principles laid down by the Privy Council in *Hanuman Prasad Pande's* case, is more than I can say. Such are at times the decisions of Courts! Under the broad and kaleidoscopic views which equity presents, one could write, I submit, a judgment in favour of the reversioners on the facts found in I. L. R., 31 Cal., 433.

## CHAPTER IV.

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### Reversioners, Widows, &c. Limitation.

There has been considerable conflict of views on the subject of Limitation respecting the claims by reversioners against widows, female heirs and their properties. The earliest Limitation Law noticed in cases was Act XIV of 1859. In this Act, no limit

Reversioner's suit, :  
Limitation.

of time was prescribed within which the reversioner was bound to sue the widow for the ordinary declaratory relief. For a time it used to be doubted if such a suit ever lay. At times it would appear it was thought that a declaratory action by the contingent heir against the widow in possession depended on his pleasure, and that he was not subject to any restraint as regards the law of limitation so long as the widow lived. All improper alienations by her were known to be valid for her life; and the Act prescribed a period of 12 years within which the heir was entitled to sue, after the widow's death, to recover both the estate which she had left and the estate which she had improperly alienated. The reversioner's interest was looked upon as one which could be enforced against the estate of the widow during the whole course of her life-time. But the claim to recover possession after the death of the female heir was governed by 12 years' rule. The Legislature subsequently thought that the Limitation Law was the law of rest, and that the unbroken continuity of suspense, which the full period of the female's life represented, was something from which the reversioner, the female and her alienee should be relieved. Consequently, for the first time, Act IX of 1871 introduced

Act IX of 1871 a clause for the declaratory action, and another clause for the possessory action.

They are reproduced below :—

Sch. ii., art. 124 :—\* Suits during the life of a Hindu widow, by a Hindu entitled to the possession of land on her death, to have

an alienation made by the widow declared to be void except for her life,—12 years from the date of the alienation.”

Sch. ii., art. 142 :—“Suits by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow”—12 years from the widow's death.

By subsequent legislation, Act XV of 1877, the clauses having been enlarged stand thus ;—

Sch. ii., art. 125 :—“Suit during the life of a Hindu or Muhamedan female, by a Hindu or Muhamedan, who, if the female died at the date of institution of the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life-time or until her remarriage.”—*Same period.*

Sch. ii., art. 141 :—“Like suit by a Hindu or Muhamedan entitled to the possession of immoveable property on the death of a Hindu or Muhamedan female.”—*Same period.*

Thus, the language of the clauses having been expanded, the law was brought in strict conformity with the legal principles and their expositions by the Courts of Law. The whole law on the subject, regarding the right of the female heir in her estate, her right of alienation with reference to legal necessity, the exclusive right of the *next presumptive reversioner* &c. has been all condensed in the clearest possible expressions in the articles of the Limitation Act of 1877.

It follows from the above, that if a Hindu female admittedly alienates her life-interest only, the question of legal necessity for the transaction does not arise ; and the reversioner has absolutely no cause of action<sup>1</sup> to impeach the dealing.

Forfeitures caused by remarriage of Hindu widows laid down in Sec. 2 of Act XV of 1856 have been expressly provided for in Art. 125, but omitted from Art. 141 ; because, it is suggested, Art. 143 of the Schedule has provided for it. Doubts have been expressed in some cases if remarriage which is permitted by the

Alienation of life-interest only.

Remarriage and forfeiture of widow's estate.

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(1) Raj Bahadur v. Achambit, cited in 6 C. L. R. 46.

custom of the caste will entail forfeiture.<sup>1</sup> But a later decision of the Calcutta High Court<sup>2</sup> has, following a decision of the Madras High Court,<sup>3</sup> and an earlier Full Bench decision of the same High Court,<sup>4</sup> dissented from the Allahabad ruling quoted above. It has been held in the Calcutta case,<sup>5</sup> that a Hindu widow, on remarriage forfeits the estate inherited by her, although according to the custom prevailing in her caste, a remarriage is permissible. In a case<sup>6</sup> before the Judicial Commissioner, C. P., the learned Judge, Mr. Stanley Ismay, having discussed and distinguished some of the earlier rulings noted above, deduced the most logical conclusion by laying down that remarriage entails forfeiture quite independently of the Widow-Remarriage Act, and that the burden of proving that it does not is on the party raising the plea. In the Calcutta Full Bench case, the majority of the judges (Princep, J. dissenting) have held that if at the time of remarriage the widow had ceased to be a Hindu by open renunciation of Hinduism and a declaration under Act III of 1872, (the widow in that case became a Brahmo and then married), the same result as to forfeiture would

take place. It is, therefore, clear that the Renunciation of religion or conversion no avoidance of forfeiture for remarriage. disqualification and forfeiture can not be avoided by marrying as a convert. In *Gopalsing v. Dhungzee*, 3 W. R., 206, the widow became a Muhammedan and then married. The Court held that the widow had saved herself from the Act (Sec. 2, Act XV of 1856) by renouncing Hinduism. But the aforesaid F. B. ruling has overruled this view as bad law.

It may be necessary to revert to this subject hereafter when discussing the *rights* of females generally; but it will not be out of place to remark that like the legal forfeiture caused by remarriage

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1. *Harsaran v. Nandi*, 11 All., 330, *Parekh v. Bai Bhakat*, 11 Bom., 120. *Ranjit v. Radha Rani*, 20 All., 476.

2. *Rasul Jehan v. Ramsaran*, 22 Cal., 589.

3. *Murugayi v. Viramakali*, 1 Mad., 226.

4. *Matungini Gupta v. Ramrattan Roy*, 19 Cal., 289 F. B.

5. To the same effect is *Vitten v. Govinda*, 22 Bom., 321.

6. *Musstt. Rupa v. Mohunlal*, 9 C. P. L. R., 47.

change of religion and loss of caste had the same effect prior to the passing of Act XXI of 1850. But by Bare change of religion or loss of caste no forfeiture. reason of Sec. 1 of Act XXI of 1850, this disqualification has been entirely removed.

To the feelings of an ordinary Hindu, it may perhaps be outrageous that unchastity or loss of caste during widowhood has not the effect of depriving her of her inheritance; that the traditional laws of the ancients, enjoining forfeitures, penalties, and punishments to preserve the sanctity of religion and of caste, have been abrogated by the British Indian Legislature under the express wording of the Act quoted above: and that the estate once vested in a widow will not be divested for any of those causes mentioned in the body of the section. The memorable decision of the Privy Council in *Moniram Kolita v. Keri Kolitani*, I. L. R., 5 Cal., 776, has finally set the point at rest.

Like forfeitures brought about by civil and natural deaths which let in the succession of the next heir, divesting of estate also takes place by other events, among which adoption and the subsequent birth of an heir occupy an important place. But in such cases, Adoption or subsequent birth of heir. till the actual adoption or the birth, as the case may be, takes place, the widow's succession does not remain in abeyance as if in expectation of an heir. The event, adoption or birth, causes the heir to spring into existence, and if an improper alienation had been effected, before the event, he would have the same rights to question the transaction as those of an ordinary reversioner. Nay more, the widow would be divested of the estate as if she were dead. In a Bombay case,<sup>1</sup> the adoption took place twenty years after the alienation by the widow; and two years after the adoption, the son impugned the sale as unnecessary, because, it was shown that the estate yielded a large income so that there was no legal necessity for the alienation. The sale was therefore set aside. The Madras view on this point,—see the ruling quoted above, discussed in the foregoing Chapter,—is not apparently followed in Bengal. In the case of *Amritalal v. Jatindra*, I. L. R.,

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1. *Moro Narayan v. Balajee*, 19 Bom. 1809. *Vundravandas v. Cursondas*, 21 B. 646. But see *Sreeramulu v. Kristamma*, 26 Mad. 143.

32 Cal., 165, it was held consistently with the views on the subject which prevail in Bengal and in Bombay, that in order to sue to set aside an improper alienation made by the widow, the cause of action to recover possession, from the alienee accrues to the adopted son at once. The widow Labangomoni effected an unnecessary and wasteful lease of a permanent nature, and died about 40 years afterwards, in 1896. She had adopted a son in 1857, who died in 1862, leaving a widow. The latter died in 1899. The reversioner sued in 1902 to set aside the lease and to recover the

property on the ground that the alienation was invalid and had not the support of legal necessity. But as it was held

Adopted son : Limitation  
No Legal Necessity : cause  
of action

that the complete cause of action for the same relief had accrued to the adopted son during *his* life-time, *though the adoptive mother was then alive*, the reversioner's claim was barred by time under Art. 141, Limitation Schedule. The learned Judges followed a wide range of decided cases<sup>1</sup> on the subject, that the cause of action in respect of an alienation not supported on the ground of legal necessity accrues to the adopted son as soon as he is adopted. It has also been pointed out that the earlier cases<sup>2</sup> on the same point had in the first place certain peculiar features, and then they

were not considered sound by Mr. Mayne, Babu Upendra Nath Mitter, and by Mr. Starling. It is very unfortunate that we do not find any reference to the Madras case, I. L. R. 26 Mad., 143, either in the discussions of the learned pleaders, or in the decision of the learned Judges.

Do : earlier cases doubt-  
ed.

We are then entitled to hold that the civil rights of the

Termination of widow's  
civil rights. Adoption, Re-  
ligious order &c, &c.

widow to her estate of inheritance are at an end when she adopts a son to her husband. It has been held also that retirement into religious life, entrance into religious order, or becoming an anchorite or a *Sannyasinee* or the like, when it is not a pretence

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1. Lakshman v. Radhabai, 11 Bom. 609. Nathaji v. Hari, 8 Bom. H. C. 67. Moro v. Balaji, 19 Bqm. 809. Bijoygopal v. Nil Ratan, 30 Cal. 990.

2. Govinda v. Ram Kanay, 24 W. R. 183. Prosonno v. Afzalonnessa, 4 Cal. 523.

but *bona fide* and absolute, are all civil terminations of the estate which accordingly vests at once in the next heir.<sup>1</sup>

We have said above that there is no such thing as the period of suspense or blank for the prospective heir or reversioner to come in after the widow or the female heir has once succeeded to the estate. Till the event which brings about a sort of extinction of the civil *status* actually takes place, she is the *de facto* and *de jure* owner of the estate subject to all her rights and disabilities. It retains, all the time, the characteristics of a widow's estate, and it would appear from a ruling of the Privy Council that if no other heir or reversioner is known to exist, the prospective chance

of the crown to acquire the estate by  
Crown a reversioner *escheat*, would entitle the Sovereign to step in and question any improper alienation.<sup>2</sup> The Judicial Committee have observed, after quoting with approval the entire dependent condition of a Hindu widow from the original *Sastric* texts, that the Hindu law gave her a power of disposition for religious, which it denied to her for other, purposes. These principles do not seem to be consistent with the doctrine that, on failure of heirs, a widow becomes completely emancipated, perfectly uncontrolled in the disposal of her property, and free to squander her inherited wealth for the purposes of selfish enjoyment.

"Their Lordships are of opinion that the restrictions on a widow's power of alienation are inseparable from her estate, and their existence does not depend on that of heirs capable of taking on her death. It follows that, if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the crown, the crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow."

Proceeding analytically on the particular limitation clauses relating to the reversioner's suit for possession and declaratory relief, the first thing to remember is that the right of action belongs

1. Strange's Hindu Law, 185. Compare also Sections 107 and 108, Indian Evidence Act.

2. The Collector of Muslipatam v. C. V. Narainapa, 6 M. I. A. 500: 2 W. R. P. C. 59.

to one who is "entitled to possession" at the date of suit, based on the ground of the widow's actual or hypothetical death. Hence it follows, that, theoretically the *next* reversioner, only can sue; so that if his right of action is barred by lapse of time, the remedy of the next successive reversioners runs out, so to speak, during the currency of the cause of action. Thus suppose, a man dies leaving a widow and the nearest and the remoter reversioners A, B, C, and D. The widow makes an improper alienation on 1-1-80. In 1886, A dies, when B steps into his shoes. B dies in 1893. But neither A nor B sought for the usual declaration that the alienation was void beyond the widow's life-time. After the expiry of 12 years from the date of alienation no other reversioner C or D contemplated by article 125 of the Limitation Act can bring the action.<sup>1</sup> This view need not conflict with that expressed by the Bombay High Court<sup>2</sup> in a case wherein the adopted son brought the action 22 years after the improper alienation. The position of an adopted son or an heir is materially different from that of a reversioner. The former displaces the widow from the heritage, while the latter is an *heir in expectancy*. Their limitations are governed by different principles and articles of law.

From the above, however, it does not follow that if the claim under art. 125 is barred, the suit of the heir under art. 141 would also be barred. It has been definitely settled by authorities that the

Remedies of reversioners and heirs different.	remedies under these two articles, 125 and 141, are quite independent of each other.
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Cause of action same.	Thus, if the widow's daughter allowed the twelve years from the date of her mother's improper alienation to run out, she would not be able to obtain declaratory relief, and if she got a son born
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after the expiry of twelve years, no such suit by him will lie.<sup>3</sup> But upon the widow's death, the daughter or her son, whoever would survive the widow, will get the estate, however long the alienation had been before the widow's death. We shall have occasion to revert to this subject hereafter.

1. Pershad v. Chedilal, 15 W. R. 1.

2. Moro v. Balappa, 19 Bom. 809.

3. Pershad v. Chedilal, 15 W. R. 1.



After the expiry of the period of twelve years from the date of alienation, the remedy of the *presumptive* reversioner, whoever he may be, at the date of the action, is lost for ever so far as the declaratory relief is concerned. But the rights of a distant or a remoter reversioner stand on a different footing. That the remoter reversioner can come in at all is the creation of case-law pure and simple, and is a graft of equity on the Hindu jurisprudence. It can hardly be contended that the express wording of art. 125 will govern the case of a remoter reversioner. For under no circumstances can the remoter reversioner be said to be the person "who, if the female died at the date of instituting the suit, would be entitled to the possession of land" within the meaning of the article. To him, therefore, the date of alienation is no concern. His *raison detre* as a claimant depends on another essential ingredient, namely, fraud and collusion of the next reversioner. When that occurs, or any other justifying reason, entitling the remoter reversioner to sue, takes place, his right to sue commences from that time, and his case falls under the general clause of Art. 120, of the Limitation Schedule.<sup>1</sup> The case of immediate reversioner being provided for by Art. 125, the general remedy of other contingent reversioners must be governed by Art. 120.<sup>2</sup> Thus, in the aforesaid illustration, if the reversioner A remains quiet for a time after an improper alienation by the female, and commences to speculate on the reversionary interest which he is supposed to represent in the first instance, or enters into a bargain with the female or her alienee, that would be a matter of fraud on the reversion or of collusion which will give to the remoter reversioner an immediate right of action. But if the presumptive reversioner simply remains quiescent, and the remoter reversioner does not come in under circumstances justifying his suit, or if, as a matter of fact, no such justifying reason exists, the whole line of reversionary heirs loses the benefit of the declaratory relief during the life-time of the female. Bare silence is not fraud or collusion.

1. Chukkunlal v. Lalit Mohan, 20 Cal. 906.

2. Puraken v. Parvathi, 16 Mad 138. Shekh Sulaiman v. Shekh Ajimodin, 17 Bom. 431. Parwora Sahi v. Mt. Wajidi, 6 C. P. L. R. 33.

Recent rulings have introduced important modifications in the prevailing views on limitation and on the rights and remedies of the reversioners, near and remote. The rights of the reversioner were very slowly recognized at first. The word "reversion" was coined by the early judges, on the analogy of the English conception on the subject, to signify the interest of the heirs, near and distant, after the death of the female heir. What that interest is was well-known by the people: and if the female heir makes wasteful alienations, there has always been a keen feeling to resist her and to find the remedy. A recent decision<sup>1</sup> of a Calcutta Division Bench has considered that the omission, on the part of the nearest reversioner, to sue for the declaratory relief within the period of 12 years from the date of the alienation has the prejudicial effect to preclude the reversion to seek for the remedy which Art. 125 of the Limitation Schedule contemplates. This

Reversioner's Delay or  
Omission.

by itself, it is said, is the cause of action for the remoter reversioner to maintain an action. Culpable omission is practical concurrence in the alleged improper alienation, on the authority of a Madras decision.<sup>2</sup> It was held that the earlier view of limitation expounded in *Pershad v. Chedee Lal*, 15 W. R. 1., which was followed by the Bombay High Court in *Chhaganram v. Bai Mate*, I. L. R., 14 Bom., 512, was confined within the limited scope of the Limitation Law that was in force prior to the passing of Act XV of 1877. It was held by the Calcutta Court, following the decision<sup>3</sup> of Allahabad, that where there are several reversioners, entitled successively under the Hindu Law to an estate held by a Hindu widow, no one of such reversioners claims through or derives his title from another. Each reversioner stands on the independent footing of his or her own right traced to and derived from the last full owner. It would, therefore, be unjust and inequitable to hang the fate of all the other remoter reversioners on the same peg of the Limitation Schedule. Article 120 affords a most general clause to shelter a claim which finds no appropriate Article elsewhere in

1. *Abinash v. Harinath*, 32 Cal., 62.

2. *Govinda v. Thammal*, 14 Mad. L. J., 209.

3. *Bhagwanta v. Sukhi*, 22 All., 33.

the Schedule. Thus, then, an infant remoter reversioner has a wide and extensive field of time before him: and thus, there remains no reason why the wastefulness of the female heir if passed over in silence by the nearest reversioner should remain unchallenged by the other reversioners during the whole course of the female's lifetime. To the same effect is the decision of the Madras Full Bench<sup>1</sup> in 1906, noticed in another respect in the foregoing Chapter. At pp. 398-99 are collected the old and the current views on the subject; and it has been held that no remoter reversioner need be prejudiced by the omission, delay or the laches of the presumptive reversioner. The Bombay case, referred to above,—I. L. R., 14 Bom. 512,—lays down the rule of limitation law correctly in so far

that if there be an alienation without legal necessity brought about by sale in execution of decree against the female heir the period of limitation for suit by any reversioner during the lifetime of the female is 6 years under Art. 120 of the Limitation Schedule. The dissenting rulings of later dates disagree with the view of the ruling only to this extent that the bar of limitation for the declaratory right against the presumptive reversioner is no bar whatever to another reversioner for reasons which have been explained above.

The aforesaid view of the matter reestablishes the Law of Limitation in force before and at the time of the passing of the First Limitation Act in British India,—that is to say, Act No. XIV of 1859. The prevailing idea on the subject held at that time, and up to the time of the passing of Act IX of 1871, as stated in the earlier part of this Chapter, was this that the entire length of time during which any female heir,—a widow, mother, daughter and the like—held the qualified estate of inheritance, was a period of suspended Limitation Statute. It is perfectly consistent with the policy of legislation on the subject that the law of limitation for suits and that of limitation as regards the rights of transfer without legal necessity of the female heirs would bring about a conflict of views that would be destructive of that policy and

<sup>1</sup> Chiruvolu v. Chiruvolu, 29 Mad., 390, F. B.

nullify legislation. The result is that we have the views of Courts, discussed in the preceding pages that it is quite open to the presumptive reversioner to sue for the declaratory relief within 12 years from the date of alienation of property without legal necessity; and that under the shelter of any kind of plea, reason, or excuse, in the case of the remoter reversionary heirs of all classes and denominations,—agnates, cognates, *Sapindas*, *Sakulyas*, *Samanodakas*, and others up to or down to the Crown,—it is permissible to sue the widow, and the alienee, impleading the presumptive heir that the alienation was an unauthorised encroachment on the reversionary interest. As the reversioners' rights went on gradually being revealed to the judicial discriminations of the Indian Judges and the Jurists, the case-law on the subject opened up an interminable vista of the causes of action of all classes of the reversionary heirs, mentioned above, to question the unauthorised transactions of the female heirs on the ground of want of legal necessity. In other words, Articles, 125 and 120 of the Limitation Schedule,—the former for the immediate, and the latter for the remoter reversioners,—occupy the whole period of the duration of the widow's interest.

No alienee of estate of a qualified owner has any reason or right to complain that he holds an estate of precarious validity, and certainty. With his eyes open, he bargains for and accepts the alienation of an estate from the owner of restricted rights. The accepted view of Article 141 of the Second Schedule of the Limitation Act is alone sufficient to convince him that Article 125 of the Schedule was no law of rest for him. The nearest reversioner may collude or consent. He may acquiesce in the act of alienation; or he may be supinely silent or indifferent about it. The dread of being sued by any of the interminable list of possible heirs, called the remoter reversioners, will continue to haunt the alienee for all the time of the proverbial longevity of the Hindu widows. There is yet another spell of 12 years time after the close of the life-interest. This is the net result of the discussions of Courts on the subject up to the present moment. The only way out of the difficulty is the protection which undoubted legal necessity of the transaction can afford. If that be clear, certain, and unimpeachable, it is never in the power of any reversionary heir, near or remote, or

of the prospective heir at the time of the death of the female incumbent of estate, to disturb the absolute interest created in favour of the alienee.

There are cases<sup>1</sup> to show that the enforced alienation brought about by the operation of decree and its execution against the female heir in possession gives rise to the cause of action for all the classes of reversioners, immediate as well as remote. But the two rulings just cited differ in one respect : and that is, as to the law of limitation that would govern such cases. The Bombay case which is no longer an authority on the limitation question on which the suit was dismissed in Second Appeal, was an action that was very wrongly framed. It was a suit by the sons of the daughter of the late owner three years after the death of their mother who was the direct reversioner after the widow against whom the decree was executed and the property was sold at auction. This took place in 1869. It does not appear, in the report, whether the widow was alive or dead at the time of the auction-sale. But it is clear that her daughter died in 1879 without questioning the validity of the auction-sale. On the facts stated the decree against the widow

was for a debt due by her husband, that is, the reversioner-daughter's father, the late full owner of the estate. If this fact was correct, then, under the principle that prevails in Bombay that the daughter inherits an absolute interest in that Presidency,—and admittedly she did not sue for 10 years before her death, and the suit was not filed till 3 or 4 years after her death,—the final result of dismissal of the suit would have been quite intelligible on the merits. Because once the limitation began to run against the daughter from the time of the auction sale, the race horse of limitation ran its full course for more than 12 years before the suit by her sons. But that was not the limitation bar according to the High Court decision under consideration. The Court held that as it was not a case of voluntary alienation by the widow but an execution sale brought about inspite of her will, Article 125 had no application ; but that Article 120 applied, the six years' period of

Alienation by decree:  
Reversioner.

Execution Sale. Art. 125  
or Art. 120<sup>9</sup>

1 Chaganram v. Bai Mati, 14 Bom., 512. Sheosingh v. Jeoni, 19 All., 524.

which expired in 1875 (from 1869). The daughter's remedy being thus barred, held the High Court, the eventual remedy of her son after her death was also barred. That this is a bad view of the law has been amply shown already with quotations of recent rulings<sup>1</sup> which have expressly dissented from that view. The expiry of limitation for the declaratory relief is no bar to the possessory relief that is available to the heir of the last male full owner at the time of the death of the life-interest holder. In the Bombay case under consideration the daughter's remedy was clearly available for 12 years after the execution sale. And as the daughter combines in her the dual capacity of an heir to her father as well as an incumbent on the estate for life, she had in her former capacity a full period of 12 years from the date of the auction sale to recover possession of the estate from the purchaser on the ground of want of legal necessity, and in the latter capacity the heir to come after her death should have full period of 12 years, reckoned from the moment of her death within which he has right to sue for possession. In the Bombay case the daughter, after her mother's death, was not entitled to sue for bare declaration by reason of the *proviso* to s. 42, Act I of 1877; because she was competent to seek the consequential relief of possession as an heiress. Therefore under Article 141, she was entitled to sue up to the year 1881, but as she died in 1879 leaving the plaintiffs, her minor sons, the latter's claim in 1883 was well within time. But apart from that fact the plaintiffs had their own statutory period of 12 years from the time of their mother's death *i.e.* from 1879 to 1891 apart from the question of the inherent legal disability on the score of their minority. In this way, therefore, the Bombay decision reported in I. L. R., 14 Bom., 512 is opposed to law in every possible view of the matter. We have got a recent decision of the Calcutta High Court *Abinash v. Harinath*, 32 Cal., 62 in exact conformity with the other rulings of Allahabad and Madras which have dissented from the Bombay case cited above. In *Sheosing v. Jeoni*, I. L. R., 19 All., 524 the Court held that there was, between the widow and another party a collusive decree for possession in favour of the latter. This

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<sup>1</sup> *Bhagwantha v. Sukhi*, 22 All., 33. *Govind v. Thiyammull*, 28 Mad., 57. *Cherunallu v. Cherunallu*, 29 Mad., 390, F. B. *Sheosing v. Jeoni*, 19 All., 524.

entitled the reversioner to treat the transaction as an alienation within the purview of Article 125 of the limitation schedule.

These various kinds of actions formulated by the reversioners, near or remote, to impeach unnecessary alienations by the female heirs are valuable safe-guards. They bear the practical fruit of quieting of titles, or anticipating them on the event of the female's death. If such precautionary actions are not taken, the eventual remedy of the heir on the death of the female remains in tact. If the reversioner bides his time till the female heir dies, he has full twelve years from her death to sue and recover possession annulling the improper alienation. "On the death of the female," says Mr. Mitter in his Law of Limitation. "a separate cause of action for immediate possession of the property accrues to the reversioner." The expression "cause of action," has not perhaps been quite accurately used. Because it may be easily understood that the reversioner's *cause of action* to recover improperly alienated estate, based as it always is on the want of legal necessity for the alienation, is one and indivisible throughout. He has only different remedies at different times; that is to say, one kind of remedy or relief is available to him on this side, and another kind, on the other side of the female heir's grave. So that, the reversioner will not, by not electing to pursue or seek the first remedy, forfeit the ulterior and more substantial remedy under Art. 141. But if the first remedy is lost by suit or by adverse decision, the *whole cause of action* is exhausted, and the ulterior remedy is lost for ever. Similarly, the successful termination of the reversioner's suit is a complete exhaustion of his *cause of action*, and the female heir's death only paves the way for his quiet and undisturbed succession to the estate. Reports are replete with case-law on this subject, and we need only notice some of the leading rulings.

The earliest and the most authoritative decision on the subject is the celebrated *Sivagunga*<sup>1</sup> case, already noticed, before the Privy Council. In another decision,<sup>2</sup> their Lordships have held that Art. 141 in the Limitation Schedule fixes the date of the female heir's

Effect of previous decision on Limitation.

<sup>1</sup> *Katama v. Shivagunga*, 9 M. I. A., 539.

<sup>2</sup> *Hari Nath v. Mothur Mohun*, 21 Cal., 8, P. C.

death as the starting point for limitation, but that it cannot override the effect of an adverse decree previously passed in a suit by an antecedent reversioner against the widow's estate. The previous suit was dismissed as barred by limitation. Second suit, therefore, did not lie. A Hindu widow completely represents the estate. She

is not a qualified owner thereof. If she sues  
 No abatement. • and recovers an estate, or if she is sued and loses, the gain or loss follows the inheritance. If the widow dies *pendente lite*, the reversioner is entitled to step in. The claim does not abate.<sup>1</sup> But the previous decision in order to have the binding effect should have a fair trial.<sup>2</sup> In *Hanuman v. Bhagaute*, I. L. R. 19 All., 357, the widow made an alienation without legal necessity and died in 1857. She was succeeded by three daughters, some of whom had sons. One after another, these daughters died. The last died in 1890. Before proceeding further, we have to consider

the comparative reversionary *status* of the parties concerned in this case. The daughters  
 Reversionary *status* of female or male reversioner. were of the *nearest* reversionary class. Their sons were the *remoter* male reversioners. But both the classes of reversioners trace their claim, independently, from the late owner. From 1857 to 1890, that is, for 33 years, the daughters, curiously enough, never sued the alienees to recover the property which, for want of legal necessity, was recoverable in 1857 when the widow died. Under the old Limitation Law of 1859, the claim of the daughters became barred in 1869. Even if the present Limitation Article had been in force in 1857, the claim of the daughters would have been barred after 12 years counting from the death of the widow. But the daughters remained silent for 33 years. It was held in the case that the daughters' sons had full 12 years time after 1890 to sue for the recovery of the estate from the hands of the improper alienee. The expression, after the *death of the female heir*, used in Article 141 of the Schedule, means, according to this decision, female heir as well as female reversioner becoming an heir after the death of the former. And it has been supposed that by the claimant, *Hindu or Mahomedan*, in the first column is meant the

1 Parbutty v. Higgin, 17 W. R. 475. Premimoyi v. Preonath, 23 Cal. 636.

2 Tribhuban v. Sri Narain, 20 All., 341. Madan Mohan v. Akbaryar, 28 All. 241



male heir representing the full ownership as distinguished from the limited interest of the female heir. Whether the language or the express wording of the Article warrants this interpretation or not is more than I can say. But this apparently is the view of the Court; and whether we accept it or not is another matter. In a later case<sup>1</sup> before the same High Court, the above view has been supported with the reservation that Mr. Justice Burkitt was no right in his *obiter* that adverse withholding against a female reversioner,—later on coming as an heir,—or rather, adverse withholding against a female heir was a bar to the claim of the male reversioner coming after the female. All that I need say on this subject is that this is a very strange distinction of the comparative heirships of a female and of a male reversioner. If a person creates a *Debutter*

estate, or an estate in the nature of an endowment, and invests his wife with the right of

*Debutter* estate. management under a scheme of management to descend on the heirs in accordance with the rule of devolution under the Hindu Law, an improper alienation without any necessity for the *Debutter* property made by the widow must be set aside under Article 124 of the Schedule; the reversioner is not entitled to claim the benefit of Article 141.<sup>2</sup>

While considering the two decisions,—I. L. R. 13 Mad., 512 and I. L. R. 19 All., 357,—Mr. U. N. Mitra, the Mr. Mitra's view on the celebrated author of the Indian Limitation above. Law, refers to 9 W. R., 505, F. B. and 23 W. R. 214, P. C. as authorities for the proposition that under the old Limitation Law, at all events, period of limitation, as against the male reversionary heir, should be reckoned from the time at which it would have been reckoned against the surviving daughter for her suit against the trespasser. The adverse withholding not only barred the remedy, it extinguished also the title to the inheritance which she represented for the time being. The learned author then goes on making other quotations,<sup>3</sup> and winds up the subject, remarking that under the old law the possession of the

1 *Amrit Dhar v. Bindsri*, 23 All., 448.

2 *Pydigantam v. Rama Dass*, 28 Mad., 197.

3 See U. N. Mitra's *Limitation Law*, 4th Ed., p. 1043.

alienee was adverse to all persons who represented the inheritance, the female heir as well as the reversioner. Having seen the difference in the scope and application of clauses 125 and 141 of the Limitation schedule, and also the difference in the remedies in cases of improper alienations by the female heir available to the reversioner

or the heir, as the case may be, founded on  
Adverse holding against female heir. the want of legal necessity, we are landed

on the broader question as to whether the reversionary heir can always successfully maintain the action to recover the female's estate in the hand of a third person, however long and *adversely* he might have held the estate against the female. It may be, as it not unfrequently happens, that during the proverbial longevity of the female heir, the stranger had *adverse* possession of the estate over half a century, and it may be that the property has been alienated or lost by the female without any reference to legal necessity: are we to understand that upon the female's death, and on the want of legal necessity being established, or rather, on the existence of legal necessity being not proved by the party in possession, the latter will be at once deprived of the estate at the suit of the reversionary heir? The question thus raised presents two aspects. *First*, voluntary alienation by the

female heir; *secondly*, her hostile dispossession  
Voluntary alienation and adverse dispossession distinguished. by adverse withholding, brought about by forcible ejectment, execution of decree, or other circumstances unconnected with her will

and without any fraud or collusion on her part. The loss of estate, under the second aspect, has not much bearing on the doctrine of legal necessity which is invariably a point for enquiry in cases of voluntary alienations by the female heir of her estate. Possessory action by the reversionary heir, on the death of the female heir under both the circumstances, is now governed by Art. 141 of the Limitation Schedule: and in connection with the broad question of limitation stated above, the law on the subject has passed through considerable changes from 1859 to 1877, and even after 1877, it can hardly be said that there has been an absolute unanimity of views in the decisions of Courts up to the Privy Council. Female heir's dispossession of the estate under the pressure of circumstances unconnected with her will, being a matter beyond the legitimate

scope of the present treatise we refrain from a detailed consideration of the law of limitation in that respect. But at the same time we cannot help remarking that if a female heir is involuntarily dispossessed, say, for instance, in execution of money decree against her, after her death the contention may very well arise between the heir and the purchaser at auction that the alienation has been brought about without any legal necessity, and that consequently nothing more than the widow's estate has passed under the sale.<sup>1</sup> Ordinarily, dispossession by means of execution of decree is what frequently happens. If without fraud or collusion on her part, a female heir is adversely kept out, no question of legal necessity arises. In such cases, the third party in possession holds adversely against the female heir. Then again, as between her and her alienee the latter's possession may be adverse to her.<sup>2</sup> Suppose a widow sells a part of her estate and parts with possession. After 12 years *her* claim to recover possession is barred by limitation. Thus, it is clear that *adverse* holding against the female heir may alike be the outcome of her voluntary action or involuntary dispossession. In either case, the withholding or dispossession is adverse to the woman. We have to see, if in all cases of adverse withholding, whether the reversioner, grounding his case on the want of legal necessity, the woman's connivance, her reckless inattention to her interests, or the like, can maintain an appropriate action in the court of law; or whether he is bound to wait till the woman dies, and is entitled to believe with confidence that he will succeed to regain the outgoing estate the moment she dies. The remedy of

the reversioner during the tenure of the woman's life will come up later on for consideration. But regarding the prospective chance of the reversioner's success on the death of the life-holder, it can hardly be said that there has been a clear unanimity of views of Courts, at least up to a few years ago. There have been

1. As to limitation for such suit by the reversioner during the life-time of the female heir, see *Baijun v. Brijbhukan*, 1 Cal., 133, P. C.

As to legal necessity in connection with alienations under execution of decree, compare *Ram Coomar v. Ichamoyi* 6 Cal., 36; *Kameshwar v. Ram Bahadur* 12 Cal., 458; *Narana v. Vasleva* 17 Mad., 208.

2 *Radhabai v. Anant*, 9 Bom., 198 *Madhava v. Narayana* 9 Mad., 244.

discrepancies and prevarications arising out of the question of limitation after the lapse, sometimes of very long duration, of the statutory period prior to the reversioner's action under Article 141 of the Limitation Schedule. In ordinary cases of alienations by the widow, the possessory remedy of the reversioner against the alienee is always considered within time for 12 years after the widow's death.<sup>1</sup> A glance at the list of rulings noted would lead one to expect that there could be no doubt or mistake about the matter. Yet there began to occur cases of departures from the principle so authoritatively laid down. There was consequently another Full Bench reference and decision<sup>2</sup> in conformity with the same view, and a strong following by the same and other High Courts of India.<sup>3</sup>

It is needless to make further quotations, or to pursue this subject any longer. But we cannot help remarking that cases did occur containing discrepant views in the face of all the clear pronouncements mentioned above. We are quite prepared to distinguish those cases, the facts of which show that where the possession of the adverse holder is founded upon a title which is destructive alike of the widow's estate as well as the estate of the person entitled to succeed upon her death, such possession is adverse to the widow as well as to the reversioner. Otherwise, we are at liberty to disagree with those other rulings of Courts which found the doctrine of limitation against the reversioner on the mistaken reading of section 28 of the Limitation Act. Regarding this, the

only remark that need be made is this, that  
 Widow's estate defined. although the widow fully represents the estate, she does not in her life-time represent the full and unrestricted ownership. The extinction by lapse of time of her title by an adverse withholding against her, voluntarily effected or involuntarily brought about, cannot possibly involve or include the inchoate and prospective right of the reversioner. All these contro-

1 *Nobin v. Issur*, 9 W. R., 505, F. B. *Saroda v. Doya*, 5 Cal., 938. *Amritlal v. Rajoni*, 23 W. R., 214, P. C. *Musstt. Bhagbutty v. Choudhry Bhola*, 24 W. R., 168, P. C.

2 *Srinath v. Prosunno*, 9 Cal., 934, F. B.

3 *Kokilmoni v. Manik*, 11 Cal., 791. *Mukta v. Dada*, 18 Bom., 216. *Musstt. Ganga v. Sitaram*, C. P. J. C. Select Case No. 16.

versies are now set at rest by the recent ruling of the Privy Council which has been rightly interpreted by the learned Judicial Commissioner of the Central Provinces and Berar in the 3rd volume of the Nagpur Law Reporter, March 1907.<sup>1</sup> It must now be considered as a settled point of law that, ordinarily speaking, a reversioner has 12 years to sue to recover possession of his heritage, moveable and immoveable, that falls on the death of the late female heir.

The Nagpur case just cited above presents another important feature which it is very necessary to note. Assuming that the

Alienee impleading reversioner with female heir. mortgage in suit was at all events consented to by Gajra Bai with the ordinary restricted rights of a female heir, the mortgagee as plaintiff, instituted a thoroughly representative action by impleading her with her son as defendant in the suit. This point has been discussed in the preceding chapter with a quotation from the learned work on Mortgage by Dr. Rash Behari Ghosh, supported with rulings. Let us suppose that the mortgage to the plaintiff in the case before us was by Gajra Bai herself as the executant thereof, and she had a son, Anand Rao, with chances of the prospective full ownership of a male heir. There can be no doubt that the plaintiff would be fully justified to implead, as he did, his mortgagor with the reversioner. There still exist some discrepant views on the question of limitation as regards the reversioner's action. The

discrepancies have been noticed in a well-considered judgment of the Bombay High Court. Several other points of law were involved in the case with which we are not concerned. But one chief point in the case was how far the bar of limitation against the widow would affect the reversioner. In the decision by the High Court of Bombay,<sup>2</sup> where this question was discussed thread-bare by eminent counsel on both the sides, the following passage occurs in the judgment of the learned Chief Justice (Farran, C. J.) "A Hindu entitled to the possession of immoveable property on the death of a Hindu female appears to us to mean a Hindu whose title to the possession of immoveable property accrues upon the death of a Hindu female,

<sup>1</sup> Runchordas v. Parvati, 23 Bom., 725, P. C. Anand Rao v. Bansinath, 3 N. L. R., 35.

<sup>2</sup> Vundravandas v. Cursondas, 21 Bom., 646.

and does not except the case where during the life-time of the widow the adverse possessor has been in possession for twelve years. This view of the law has been accepted by all the Indian High Courts with the exception, perhaps, of Madras; but there the question was not discussed. We refer to the decisions in *Srinath v. Prosonna*, I. L. R., 9 Cal., 934; *Kokilmani v. Manik Chandra*, I. L. R., 11 Cal., 794; *Shamlal v. Amarendra*, I. L. R., 23 Cal., 460; *Dwarkanath v. Komolmoni*, 12 Cal., L. R., 548; *Ram Kale v. Kedar Nath*, I. L. R., 14 All., 156; *Mukta v. Dada*, I. L. R., 18 Bom., 216; *Moro v. Balaji*, I. L. R., 19 Bom., 809; without suggesting that the list is exhaustive. There are some decisions the other way, but those which we have mentioned are the decisions of the courts at present binding." The two Privy Council decisions, cited already have been explained by the learned Chief Justice with the remark that the precise question did not arise in either of them. On the facts of the case, the learned Judges held that whereas the widows' husband bequeathed the bulk of his property on trust, held void and inoperative, the executor's possession was in every sense adverse to the widows. They had held under the will and dealt with the estate according to their pleasure, and the consent, knowledge, or concurrence of the widows was only a myth and a delusion.

The claim for the moveables was, however, under these circumstances, held to stand on a different footing.

Reversioner moveables: The widow Nenavahoo had the inherent right adverse holder. over the income of the estate in her hand, Then by her husband's will, she was given full and absolute power of its disposal. Her own bequest to that extent was upheld. If any of such income or accumulation had been left undisposed of by her, the reversioner certainly could claim. The period of limitation therefor is of course different as stated elsewhere. But as against the adverse holder, as in the above case, it has been conceded that as to any moveable property in his hand or the rent and profits of the immoveable property, if the widow's claim to both was barred at her death, the reversioner's claim is also barred, as there is no provision in the Limitation Act which gives the reversioner a fresh starting point from the death of the widow.

The view of the High Court of Bombay in the case just cited, *Bombay veiw re move.* regarding the income, accumulations and ables doubted. moveables of all sorts in the possession of the adverse holders, during the life-time of the widow, is open to grave doubt. We have seen it repeatedly laid down that the adverse withholding of estate, moveable as well as immoveable against the widow is never a bar to the heir at the time of the widow's death. On this subject, apparently, there has been no argument before the Judges of the High Court of Bombay. The heir's right to sue in the case cited,—nay, his cause of action—arose on the widow's death in 1888. The bar of limitation against the widow, at the time of her death, does not descend to the reversioner. It must, therefore, be held that the heir had full six years' time from the widow's death, *i.e.* 1888, to claim an account of all the incomes and accumulated savings of the estate that accrued *prior* to the widow's death. It was not sufficient to declare that the heir was entitled to those incomes &c. that accrued *after* her death, as the decree of the Court shows. Undisposed-of savings and accumulations of incomes of all sorts must be treated in the same light as the inherited moveables; and the principle of the Privy Council decision in *Bhagwandeem Dubey's* case must govern and regulate the rights of the reversioners.

In a Madras case,<sup>1</sup> the reversioner's claim was held not barred Reversioner Section 3 under Article 141 of the Second Schedule, Limitation Act, plaintiff. counting from the death of the female heir (plaintiff's mother, last owner's daughter), although if the daughter had sued at the time of action, her claim would have been barred against the trespasser. Obviously then, the reversioner, in relation to the female heir, was not a plaintiff within Section 3, Limitation Act.<sup>2</sup> In a case before the High Court of Bombay,<sup>3</sup> the reversioner (a daughter) objected to or resisted the decree-holders getting pos-

Minor articles of Limi- session of the property in execution of decree tation against the rever- against the widow. The objecting or the sioner. Art 11, Schedule II. Reversioner's objection resisting reversioner having failed, she brought in execution. a possessory action under article 141 of the Schedule after the widow's death and long after the period of shorter

<sup>1</sup> Venkataramayya v. Venkatalakshamma, 20 Mad., 493.

<sup>2</sup> Compare Seetaram v. Rambhadoo, 10 C. P. L. R., 78

<sup>3</sup> Tai v. Ladu, 20 Bom., 801. Venkataramayya v. Venkatalakshamma 20 Mad., 493.

limitation laid down by art. 11 of the Limitation Act. The Court held that the reversioner's claim to sue for possession when the right accrued upon the death of the widow was not affected by the result of the previous objection or resistance, which was not only held needless, but was without any right on the part of the reversioner; because the widow's disposition, voluntary or involuntary, was valid, without legal necessity, during her life-time.

Directly connected with the subject of the reversioner's cause of action is the case of several alienations by the widow. In her life-time, the widow may enter into several transactions of alienation of estates. The matter may still be complicated by the nature of the alienations being different; some may be for legal necessity, while others, acts of waste and improper alienations. Each transaction of alienation is a cause of obstruction to the reversionary interest or to the reversioner's claim to succession. The question is, whether the reversioner can bring one action or must he bring several actions, declaratory or possessory, as the case may be. As against the reversioner, two persons are involved in each transaction,—the aliener and the alienee. If in one suit more than one alienation is sought to be impeached, the obvious error of multifariousness arises. In its broader aspect, the common feature of all multifarious actions is that the right or the rights of a single plaintiff or a single set of plaintiffs are infringed by a multitude: and the objection, generally fatal to such actions, is the extreme difficulty and inconvenience to parties and to the Court alike. In this respect the opinions of Courts are not uniform, and the nature of each case affords the only clue for the application of the doctrine of *multifariousness*. Thus, an heir, when his succession opens, finds different persons illegally in possession of several properties. Founding his right on heirship, he may not split his claim and bring several suits. On the other hand, if a coparcener, after father's death, made unwarrantable alienations of the ancestral properties, it is doubtful if the son can bring all the alienations and the several par-

A Madras decision ties under one trial.<sup>1</sup> A contrary decision of the doubted.

Madras High Court<sup>2</sup> has been doubted. But relying on this ruling and numerous other cases, the High Court of

1. Lalljee Bhimraj v. Manna through others, 9. C. P. L. R., 125.

2. Mahomed v. Khrishan, 11 Mad., 106.



Calcutta has held (*vide* Weekly Notes for July 1897, *Ishan Chandra v. Ramessur*, p ccxxxii)<sup>1</sup> that as against the widow's alienations, the reversioner's cause of action for possession on the widow's death is one and indivisible, and he is entitled to bring one action. The English practice in actions in ejectment has been followed. But though this may be in cases of ejectment, it is doubtful if declaratory actions on the same basis can be united in one suit during the widow's life-time. The chance is obvious that the Court, in its discretion, may refuse to allow such a combination of multifarious claims and defences.<sup>2</sup> The decision in *Kachor Bhoj v. Bai Rathore*, 1 L R, 7

Bombay decision doubted Bom, 289, has been doubted in the aforesaid by Madras High Court Madras ruling But it is a question how

far, if at all, the doubts are well founded. The Bombay case no doubt lays down a sound principle. It held that a reversioner, seeking for a declaration that certain alienations made by a Hindu widow of different properties belonging to the estate of her deceased husband were invalid, could not sue all the several alienees of different natures and of different properties in one and the same action "That certainly is good sense, and.....may be admitted

to be also good law." But the Calcutta High Court<sup>4</sup> held, after considering some of

the early rulings on the subject, that if the reversioners bring one suit for ejectment against several defendants who set up various titles to different parts of properties by purchases &c. from the deceased widow, the suit is not bad. Because, it has been ruled, the plaintiffs' cause of action was one, namely, that they were the heirs after the deceased lady. "The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one. Even in England, in an action in ejectment, all the parties in possession are joined. We think, therefore, that the decision of the Court below is wrong; and, setting it aside, we remand the case to the Lower Court for trial on its merits."—See Dicey on the Parties to an Action, page 495, note (e).<sup>5</sup> The aforesaid view has been approved of in Calcutta in a recent decision

1 24 Cal 831 See *Contra* *Ganeshilal v. Khairathi*, 16 All, 279.

2. *Kachor Bhoj v. Bai Rathore*, 7 Bom, 289

3 *Sadu v. Ram* 16 Bom, 608 (p 611).

4 *Ishan Chander v. Rameshwor*, 24 Cal, 831

5 *Minet v. Johnson*, 63 Law Times, 507 (1890) *Hodgins v. Hickson*, 39 Law Time, 644 (1878).

passed on 10th July 1902—See *Nundo v. Banomali*, I. L. R., 29 Cal., 871. The Allahabad High Court holds a different opinion in this respect.—See *Ganeshilal v. Khairathi Singh*, I. L. R., 16 All., 279. Such a suit, it was said, was bad for misjoinder of parties as well as of causes of action. Section 578 of the Civil Procedure Code could not cure the defect. The High Court, therefore, allowed the plaintiff, on terms as to costs &c, to withdraw his suit as against the other defendants, *with liberty to bring separate suits*, confining the claim against only one defendant. It was conceded, however, that the cause of action was the same. It was therefore enjoined that the permission of the Court for liberty to  
 Reversioner's possessory  
 suit Sec., 43 C. P. C. bring the separate action was essential.

This was held in view of the provisions of section 43 of the Code of Civil Procedure. But the High Court of Madras,<sup>1</sup> per Bhashyam Ayyangar and Moore, JJ. have held (See pp. 745-46) that the *same cause of action* and the *same matter* for suit are distinguishable things, and that the expression used in section 43, C. P. C. is "cause of action," and not "matter." The Madras case was in respect of successive suits by the reversioner after the death of the widow. The second suit for possession was held to be not barred as relinquished, the first suit having been for another property against another defendant, though both the suits were founded on the reversioner's right to succeed on the death of the widow. The concluding words in the decision of the learned Judges are useful and instructive with reference to the point under consideration. "Under the English law and practice, in an action of ejectment, the plaintiff need include in the action only those who are in possession of the land for the recovery of which the action is brought: and in cases in which the plaintiff, as heir-at-law, may have to recover different portions of the inheritance which are in the possession of different persons, he must exercise a sound discretion and judgment *as to whether it would be expedient* to bring one action of ejectment against all the defendants, or different actions in ejectment against different persons in respect of the tenements in their respective possession." I have italicised some words in the above extract purposely to show what should be the right and the standing view in the matter of the reversioners' claims for possession, on the death of the late female heir. The questions

1. *Dampanaboyina v. Addala*, 25 Mad., 736.

of legal necessities or otherwise likely to crop up in the cases would afford valuable guides to decide whether the claims should be combined, in whole or in part, or whether they should be instituted as separate and independent actions.

The cognate subject is the reversioner *versus* the alienee's  
 Alienee's alienation.      alienee,—the primary alienation having been made by the late widow. The question is whether the reversioner, seeking to annul the alienation by the widow, and bound therefore, under the rules of pleading in force, to implead the widow and her alienee, is bound also to question the alienee's alienation, if any, and other successive alienations, from hand to hand; or will his suit and entire cause of action be held exhausted by his assailing the particular alienation of the widow only, leaving the contingent heir, not necessarily himself, to contend against the subordinate alienations if they stand in the way of his succession. The necessary parties in the reversioner's action during the life-time of the widow are herself and her alienee. But it must be remembered that the particular transaction of alienation impeached in the suit is the subject of controversy before the Court. It has been already seen that the decision passed is binding on the parties before the Court, and also on "*persons claiming through them respectively*"—See. 43, Act I of 1877: in other words, the decision has the effect of a judgment *in rem*. It has also been seen that the successive reversioners are within the meaning of the expression quoted above, not exactly because the successive reversioner is a claimant *through* his predecessor, but because the very principle of the suit clearly means that the claim is of the reversionary representative character, and that the result of the action governs the entire reversionary line, that is, the reversion itself.

But the same cannot be said, at least not so easily or plainly, as regards the widow's alienee. The scope of his entire defence is to justify the particular transaction that is questioned. Nor is the claiming reversioner bound or entitled to indicate in his plaint the further sub-alienation by the alienee. The matter of the sub-alienation is neither a ground for attack nor for defence in the ordinary declaratory action.<sup>1</sup> The inclusion of such a claim would undoubtedly lead to multifariousness.

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<sup>1</sup> *Zaminder of Pittapuram v. Proprietors of Kalanka*, 2 Mad., 23, P. C.

It will appear from the precedents cited below that the courts of law have, from the very earliest time, drawn a distinction between the scope of declaratory actions and of ejectment suits, arising out of *contingent* and *vested* interests. The widow while alive, the Hindu father in a joint estate living with his sons, joint coparceners in a Mitakshara family, and several other relations considered in this treatise, effect alienations which give rise to causes of action in favour of holders of contingent and vested rights.<sup>1</sup> In some cases, bare declaratory actions may be brought: in others, possessory suits in ejectment, partition claims &c., may also be brought. With respect to bare declaratory actions, it will appear from the earlier rulings, already cited, that the analogy of multifarious claims and defences in ejectment and possessory actions, was held not applicable: compare 3 W. R., p. 102. The contingent right of the reversioner was clearly distinguished from vested rights. Even up to the present moment, the leading principle on the subject is the *dictum* of Sir B. Peacock in the Full Bench case reported in 8 W. R., p. 15, by which, if the Courts of law and of equity do, under special circumstances of pleadings, permit in favour of the holder of vested rights claims of multifarious

Declaratory and possessory action, and multifariousness.

nature in which several items of properties are sought possession of, annulling diverse alienations, separate trials of the claims and defences have been enjoined.<sup>2</sup> Even then, as it will appear from the provisions of the old as well as the present Code, the mandate of the strict letter of the adjective law will, it may be contended, be contravened. But, as pointed out in 4 W. R. 109, the risk of *multiplication* of suits and harrassment outweigh the equitable considerations underlying the doctrine of *multifariousness*.

It is not uncommon to find multifarious possessory actions instituted by the holder of vested rights, *e.g.*, at the instance of the

1 Kant Narain v. Premlal, 3 W. R., 102; Sharoop v. Mathoor, 4 W. R., 109; Rajaram v. Lachman, 8 W. R., 15 F. B.; Baboo Matilal v. Ranee, 8 W. R., 64; Pachcouree v. Kalee Charan, 9 W. R., 490; Joggesur v. Chander, 9 W. R., 524; Ram Dyal v. Ram Doolal, 11 W. R., 273; Rajaram v. Luchman, 12 W. R., 478; Imrit Jha v. Baboo Roy, 8 W. R., 288; Ram v. Annoda, 14 Cal., 681; Narsinghadas v. Mangal, 5 All., 163 F. B.; Goneshi v. Khairathi, 16 All., 279.

2 Kubra Jan v. Ram Bali, 30 All., 560, F.B.

reversioners *after* the widow's death, the sons &c. in a Mitakshara family for possession of the entire estate of inheritance. The actions are always sought to be justified to make a shortcut of the disputes concerning the estate: and they should be allowed, first, if the complications are not serious; and next, if there be one primary alienation, and the rest, sub-alienations by the primary alienee. On the defences or the pleas being raised, the Courts feel no difficulty to perceive whether there is multifariousness; and if so, whether the plaint deserved to be rejected, separate trials should be directed, or the plaintiff should be told to amend his action in order to confine his case within manageable limits. The advantages and the disadvantages of both or all the parties should be carefully weighed before passing an order. Sir Barnes Peacock in 12 W. R., 478 rejected the claim, but not without going deeply and minutely into the several issues raised. The issues were not actually decided; but they were considered in some detail to justify the principle laid down in an early Full Bench Ruling of the same High Court. In 9 W. R., 490, the reversioner's possessory action, after the death of the widow, was against several defendants,—some, alienees from the deceased widows, and some were alienees' alienees. In this way, there were no less than seven alienations and sub-alienations which were brought forward by the parties with their manifold stories of legal necessities, or the reverse. The plea of multifariousness, as far as the report shows, was taken very late in the case. The learned Judges, while admitting that the claim was bad for misjoinder, and following the principle of the Full Bench decision in 8 W. R., 15, remarked, that “the plaint ought never to have been received or filed by the Lower Court. .... Judges below ought to be more careful to reject plaints when brought against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned. We cannot, however, dismiss the suit now at this stage of the proceedings on this ground, *when the case has been tried fully on the merits, and we have before us the materials for finally disposing of the various issues between the parties.*”

The sentences in italics have been given prominence to in order to draw the reader's attention. The pleadings and the issues were full; and sufficient materials were adduced for the disposal of

Multifariousness, convenience to court, prejudice to parties.

the case ; and the plea was taken late. Nevertheless, as remarked in 11 W. R., 273, a party cannot be prejudiced, if the Judge inadvertently admitted a plaint which is plainly multifarious. In *Subramanya v. Sadasiva*, I. L. R., 8 Mad., 75, the plaintiff brought a suit for partition of family property against his father, brothers, and 15 others, to whom, it was alleged, the father had improperly alienated numerous parcels of the same property at different times. Apparently no plea of misjoinder was ever raised ; but in delivering judgment it was pointed out, that it would have been better if the Sub-Judge had, under the provisions of Sec. 45 of the C. P. Code, directed separate trials to be held in respect of the alienations made to each of the contending defendants or the parties under whom they claimed, as the circumstances of each alienation might then have been more fully considered. The Full Bench decision<sup>1</sup> of the Allahabad High Court has been, in a later decision<sup>2</sup> of the same Court, interpreted as being nothing more than an enunciation of a principle of convenience for trial. In the Full Bench case, the trespassers and their alienees were sued together, and the inconveniences of such a suit were pointed out by the Majority of the Court. If these had not existed, and no possible risk or prejudice could be suggested, the ruling would not, as explained in the later decision, stand in the way of the trial.

Another aspect of alienations by the widow, and of alienees' alienations, and the plea of multifariousness arising therefrom remain to be considered. In a case before the Judicial Commissioner, C. P.<sup>3</sup> the decisions of Courts having been carefully reviewed, it has been held that the joinder in one action of several alienations by the widow, in her life-time or after her death, (particularly if the alienees are several with several defences justifying their respective alienations) is not permissible. Authorities have been cited to show the multifarious nature of the proceedings. The defect of multifariousness is not, however, so serious in a claim of a declaratory or possessory nature, wherein besides the principal

Widow's alienees and  
Alienee's alienees, multi-  
fariousness.

1 *Narsinghdas v. Mangal*, 5 All., 163.

2 *Indor Kaor v. Gurprasad*, 11 All., 33.

3 *Kanhaiyalal v. Balmukund*, 13 C. P. L. R., 9.

defendant others are sub-alienees, that is, claiming under the alienations made by the widow's alienee. These like grafts stand or fall with the parent tree. Indeed it is needless to implead the sub-alienees in a declaratory action that is instituted during the life-time of the widow; because the action against the principal defendant decides their fate. In that view, they are needless parties. If on the widow's death the original alienee and his alienees are in possession of the several parcels of the estate which the widow had originally held, necessity for impleading all the parties in possession arises. But the subordinate defendants barely take shelter under the main plea in defence.

If the widow adopts a son, the question has often arisen what  
 Reversioner: Adop- would be the result of the adoption on the  
 ted son: Limitation reversioner's suit with reference to Article 141 of the Limitation Schedule? In other words, in ordinary cases, the reversioner has 12 years from the death of the widow to recover property left by the deceased. If the deceased had made alienations in her life-time without legal necessity, the reversioner would have his remedy to recover the alienated estate within 12 years under the aforesaid Article irrespective of the date or time when the alienations had been effected. This, as I said before, is the ordinary state of things. It was held in many early rulings that the minor articles of 3 or 6 years, to set aside instruments, and adoptions, mentioned in the Schedule, would not stand in the way of the reversioner's action to recover the estate within 12 years from the death of the widow. But the later rulings of Courts including the Privy Council have introduced some very noticeable modifications in respect of the views of the early rulings. *Fannyamma v. Manjaya*, I. L. R., 21 Bom., 159 was an instance of the reversioner's suit for possession under Article 141, Limitation Act. The bar of adoption of a son by the widow was interposed to prevent the reversioner's claim to succeed. The suit was decided in favour of the reversioner. This ruling<sup>1</sup> has been dissented from in *Shrinivas v. Hanmant*, I. L. R., 24 Bom., 260, a Full Bench case. Hitherto, it used to be believed that viewing the adoption by a widow in the light of an ordinary voluntary alienation by her,—by adopting a son, a sort of wholesale alienation by the widow

<sup>1</sup> Compare also *Hira Lal v. Bai Rewa*, 21 Bom., 376.

of her estate is in a way effected,—there could be no distinction in principle between the reversioner's suit to recover the estate, after the widow's death, avoiding the alienation on the ground that there was no legal necessity therefor, and his suit to secure the same end after the avoidance of an illegal adoption. In another Bombay case,<sup>1</sup> both the Courts below adhered to this apparently good and early view of the matter, relying mainly on *I. L. R.*, 21 Bom., 159. That the adoption of a son by the widow is a sort of alienation of the estate by the widow in favour of a stranger prejudicially affecting the reversionary interest, there is no doubt. It cannot also be doubted that the reversioner has a

Adoption Reversioner Cause of action against the widow and the Cause of action. adopted son if there be grounds to assail

the adoption in order to protect the ultimate reversionary right—see Illustration (f), Section 42, Act I of 1877. But the Full Bench case and the case reported in the 25th volume of the Bombay High Court have held that in such cases the reversioner is not entitled to the period of 12 years from the time of the widow's death in accordance with Article 141 of the Schedule, and that the expiry of 6 years under Article 118 was a bar to the claim. When an adoption is set up, the reversioner's right is very much restricted. He is bound, within 6 years of the alleged adoption, to sue to protect his reversionary interests. In the second case, cited above, it was found that the adopted son was apparently in possession of the estate by virtue of his adoption. There were concurrent findings of the Courts below that the adoption set up was not proved, as a matter of fact or of law. But as against the reversioner's claim, it was held by the High Court that the lapse of time legally invested him with the rights of an adopted son. "Although," said Ranade, J., "the defendant is found never to have been adopted, yet he said he was; and because the plaintiffs did not sue within six years of their coming to know that he said so, the defendant must be held to have been legally adopted." I will venture to submit that this is too broad a view of the Limitation Law to extinguish the reversioner's remedy to protect his rights.

In the above case, the so-called adopted son lived with the widow. The reversioner's suit was filed within one year after her

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1 *Barot Naran v. Barot Jesang*, 25 Bom., 26.



death, but after the lapse of six years from the time of the pretended adoption. It has been held<sup>1</sup> by the Privy Council, in a decision that came out in August 1906, that if a pretended adoption is legally invalid, being of a sister's son,—see P. C. decision passed in 1899,—the widow in possession could not be ousted from her husband's property after the expiry of any length of time from the time of the alleged adoption. The Privy Council reversed the decision of the High Court of Allahabad reported in I. L. R., 24 All., p. 195, and dismissed the claim of the pretender. In this view of the matter, it is hard to see why the reversioner will not have his usual periods of limitation which are 12 years for the declaratory action under Article 125, and the same for the possessory action under Article 141, in cases of void adoptions, in point of fact or of law, treating the alleged adoption as a sort of alienation of the reversionary estate. The difficulties arise from the fact that there is a specific Article of 6 years in the Limitation Schedule for claims for declaration that an adoption is invalid, and also because it is a fiction to consider adoption in the light of an alienation by the widow.

It has been held in some recent cases even upto the Privy Council that if a reversioner's case for an alienation by the widow without legal necessity falls within the purview of Article 91 of the Limitation Schedule, he is not entitled to take advantage of Article 125 or 141, and sue within 12 years from the time when his cause of action is ordinarily supposed to arise. I will take a typical instance on the analogy of the cases recently decided. The widow mortgages an estate with her creditor who holds a deposit of her deceased husband's cash, representing to the reversioner that it is necessary to raise money to perform the marriage ceremony of her daughter. The reversioner assents to the avowed necessity, and learns immediately that the available deposit should have avoided the alienation. It is apprehended that the reversioner should not be permitted to let the instrument of mortgage effected in this manner stand unchallenged for more than 3 years from the date of his knowledge and claim the estate afterwards. In other words, the minor Article 91 will govern, in this case, the reversioner's action

Reversioner, Alienation  
Article 91 v. Article 141

1. Lali v. Murlidhar, 28 All., 488, P. C.

to free the reversion from the lien. In the recent Calcutta Case,<sup>1</sup> which came up in Second Appeal from the District of Cuttack in Orissa, Dr. Rash Behary Ghose, the learned Vakil of the High Court of Calcutta, succeeded to obtain the leave of the Court to argue on the point of limitation in a reversioner's case to recover certain property which had been alienated by a widow. The alienations were made by deeds of sale; and it was found by the Courts below that there was no legal necessity for the alienations, and that the widow died 10 years before the institution of the reversioner's suit. For the first time, in Second Appeal, and at the time of the argument, though the point was not taken in the Memo of Appeal, it was contended by the learned pleader that the plaintiff's claim was barred by Article 91 of the Limitation Schedule. This Contention was based upon the ruling in the case of *Bijoy Gopal Mukerjee v. Nil Ratan Mukerjee*, I. L. R., 30 Cal., 990 wherein it was held that an *ijava* lease, which was granted for 60 years by a Hindu widow, and which lasted beyond her life-time, was not void on her death, but was only voidable, that it was necessary before possession could be obtained that the deed should be set aside, and that as this had not been done within 3 years of the death of the widow, the suit was barred. Stress was further laid on the Privy Council case,<sup>2</sup> which was followed in the aforesaid Calcutta case. The contention in appeal failed; and the decision of the Court below on the question of limitation was maintained. The Court followed the settled view on the point, as stated in *Narmada Debi v. Shoshi Bhushan Bit*, 8 C. W. N., 802 (1904), in which it was held that it was not necessary for a reversioner to set aside a sale-deed executed by a Hindu widow before he could recover possession of the property after her death, on the ground that there was no legal necessity for the sale.

The aforesaid ruling in the 8th Vol. of the Calcutta Weekly Notes makes a distinction, very hard to perceive, between sales and leases executed by a Hindu widow, both without legal necessity. The attempt to distinguish, I apprehend, is devoid of all details. I drew the picture of a mortgage case to give

*Ditto :*  
Reason why the minor  
Article should apply.

<sup>1</sup> Harihar v. Dasarathi, 33 Cal., 257

<sup>2</sup> Modhusudan v. E. G. Rooke, 25 Cal., 1, P. C.

to the theory of 3 years' limitation a plausible shape, or some form of justification, to bring all sorts of alienations by the Hindu widow,—by *Ijara*, lease, mortgage, sale, &c.—within the category of the Privy Council decision, quoted above, by introducing the element of the reversioner's assent to the transaction which Mr. Justice Woodroffe took great pains to consider and to explain. It has been very satisfactorily shown that neither the Privy Council decision nor the Calcutta case meant to lay down any departure, in regard to the question of limitation for the reversioner's suit, in the cases of *Ijara* or lease executed by the Hindu widow, as opposed to the limitation question regarding other kinds of alienations by her. Their Lordships of the Privy Council did not mean nor did they say so, by their ruling in page 1 of the 25th Vol., Calcutta, to reverse their own previous decision<sup>1</sup> which definitely settled since 1880 the view of law that all sorts of alienations by Hindu widows made without legal necessity cease to have any effect on their death. In this respect, there is absolutely no distinction between *Ijara* or lease and sale or mortgage. All are voidable alienations in the same sense and in the same manner. It has been explained that if there were no other circumstances of consent and of equities arising out of the peculiar facts in the *Ijara* cases decided by the Privy Council and the High Court of Calcutta, now being considered: in other words, if the said cases stood barely on the footing of the alienations by leases based on no legal necessity, they could be avoided by the reversioner by his claim for possession under Article 141. I would therefore submit that the aforesaid cases of the Privy Council and of Calcutta must remain alone; and that they do not touch the broad question, well-settled in Courts since long time past, that under ordinary circumstances, the shorter period of three years' Law of Limitation does not abrogate the 12 years' rule of Law for the reversioners to sue for the usual declaration or for possession, as the case may be, in respect of alienations effected without legal necessity. The Privy Council decision reported in I. L. R., 25 Cal., page 1 is surely no authority for this strange view of law. The apparent anomaly in the view that was introduced by the Calcutta decision,<sup>2</sup> which purported to lay down that whereas the

Reversioner, 12 years' Rule, general Law, settled view: alienation.

<sup>1</sup> Raj Bahadoor v. Achumbit, 6 Cal. L. R., 12.

<sup>2</sup> Bijoy G. Mukerji v. Nil Ratan Mukerji, 30 Cal., 990.

reversioner's claim for declaration or for possession *anent* immovable property involved the relief to set aside the instrument on the ground of no legal necessity, the minor Article of 3 years' limitation was the insurmountable barrier in the way. It will be noticed that the Lords of the Privy Council have reversed<sup>1</sup> the aforesaid Calcutta decision, and they have declared once more that the Hindu widow's alienation, though it is not absolutely void, is *prima facie* voidable at the election of the reversionary heir, who may either affirm it or treat it as a nullity without the intervention of any Court; and that there is nothing to set aside or to cancel as a condition precedent to his right of action. The Privy Council have held that the very institution of suit by the reversioner, complaining of an improper alienation by the widow for want of legal necessity, is his election to treat the alienation as a nullity, and that in such a suit it is absolutely unnecessary for him to ask for a declaration that the instrument be set aside.

Are we to consider, after all this, that the anomalous views of Courts on the subject of limitation against the reversioner's claim, when the puppet of an adopted son is or claims to be in possession of the estate, should yet continue to disfigure the pages of the current legal literature of the Country, causing any amount of annoyance and perplexity to the Bench and to the Bar? Strictly speaking, this topic does not concern me or my subject in the least: because the question of legal necessity is not directly concerned in the matter. The leading texts and commentaries on Limitation will deal with the subject fully and rightly. But for the sake of consistency of views on the question of limitation, so far as the reversioners of the Hindu widows are concerned, I will venture to point out that the decision<sup>2</sup> of the Privy Council, issued in the Law Reports in December 1906, has laid it down that under the ruling of their Lordships in the case of *Jagadamba v. Dakkhina Mohan Roy*, I. L. R., 13 Cal., page 308, and the other cases that followed it, the immunity gained by the lapse of the limitation period, (12 years under Act IX of 1871, and 6 years

*Ditto*  
Limitation, Adoption.

<sup>1</sup> *Bijoy Gopal Mukerji v. Krishna M. Dashi*, 34 Cal., 329.

<sup>2</sup> *Tirbhuwan v. Rameshar*, 28 All., 727.

under Act XV of 1877) to set aside or to establish adoption, after the date of an apparent adoption, does not amount to an acquisition of title within the meaning of section 2 of the Limitation Act. And this is so, whether the alleged adoption was or was not an apparent one. The reversioner got the estate inspite of the adoption that was set up as having taken place over a quarter of a century prior to the date of the suit. It will be seen how often are the rulings of Courts read and applied, and misread and misapplied.

According to the decision of the Privy Council, and the Full Bench decision of the Allahabad High Court, and a decision passed by a Division Bench of the latter, with the numerous quotations therein contained, it must be accepted as the settled view, that there can be no bar of limitation if the reversioner files his possessory action within 12 years from the death of the widow.<sup>1</sup> Most of the numerous cases are plain and ordinary voluntary alienations effected by the widow in her life-time. Therein the plea of adverse holding against the widow is held to be not an available defence to the alienee-defendant. The reversioner is bound to succeed under Article 141, if the legal necessity for the alienation is not made out by the defendant. But difficulties and complications arise if a person, having no title to start with, goes on holding adversely to the female heir. On this subject, there are serious conflicts in the decisions of Courts. These have been noticed elsewhere in this book. But it will be useful to consider them briefly here again. In *Tikaram v. Shama Charan*, I. L. R. 20 All., 42, it has been held that where property which should by law be in the possession of a female heir is held adversely to such heir by a trespasser, the possession of the trespasser is adverse to the female heir as well as to the reversioners of such female heir; and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. While deciding in this way, the learned Judges followed *Hanuman v. Bhagauti* I. L. R., 19 All., 357, and considered that the Full Bench Ruling of the same High Court, noticed above, I. L. R., 14 All., 156, was impliedly overruled by the

1. *Ranchordas v. Parvatibai*, 23 Bom., 725; *Ramkali v. Kedar*, 14 All., 156, F. B. *Jhamman v. Tiloki*, 25 All., 435.

Judgment<sup>1</sup> of the Privy Council. It was said that the aforesaid Full Bench decision of Allahabad was based on a Full Bench decision of the Calcutta Court in *Srinath v. Prosanna*, I. L. R. 9 Cal., 934; and that both the Full Bench Cases were impliedly overruled by the aforesaid P. C. decision. A Bench of the Calcutta High Court<sup>2</sup> have however said,—“We cannot agree with the view of the Allahabad High Court, expressed in the case of *Tikaram v. Shama Charan*, I. L. R., 20 All., 42, that the case of *Srinath v. Prosanna*, noted above, has been virtually overruled by the decision of the Privy Council in the case of *Lachman v. Anant Singh*.”

Thus we see how doctors differ. One Court (Allahabad) says that the Privy Council have in a way overruled the two Full Bench Rulings,—one of Calcutta, and the other of Allahabad. Another Court (Calcutta) says the reverse, namely, that the Privy Council have done nothing of the sort, and that, in otherwards, both the Full Bench Rulings of Allahabad and of Calcutta lay down the sound view of the law of limitation, that the reversioner is entitled to 12 years to claim the property from the death of the female heir under the provisions of Article 141 of the Limitation Schedule. But, strange to say, both the Courts, Allahabad in Vol. XX, and Calcutta in Vol. XXVI, wearing different or opposite glasses have both come to one finding,—namely, that Article 141 will not help the reversioner if the female heir had been adversely held out by a trespasser who could plead the limitation bar under Article 144 against the claim for the estate, whoever might be the claimant, and set up the provisions of section 28 of the Limitation Act to extinguish the right of the claimant and to invest the trespassing adverse holder with the same. These are the anomalies in the views of Courts up to 1897 and 1898. In two subsequent Rulings<sup>3</sup> of the Allahabad High Court, the Judges have held that none of the previous Full Bench Rulings of Calcutta and Allahabad were impliedly reversed by the Privy Council. Whatever that be, we have the direct decision<sup>4</sup> on the subject by the Privy

1. Musst. *Lachhan v. Anant*, 22 Cal., 445; L. R. 22 I. A., 25.

2. *Braja Lal v. Jiban Krishna* 26 Cal., 285, 295.

3. *Amrit v. Bindasri*, 23 All., 448; *Jhamman v. Tiloki*, 25 All., 435, (pp 438-39.)

4. *Runchordas v. Parbatibai*, 23 Bom., 725.

Council again in 1899, in which their Lordships have held that Article 141 was the Article applicable to a plaintiff who claimed the immoveable property of a Hindu on the death of his surviving widow; and that the plaintiff's right being derived, not from or through the widows, but through their husband on the death of the surviving widow, a suit could be brought by such reversioner for possession of immoveable property within 12 years from the death of the surviving widow, although she might have been out of possession for more than 12 years.

The view prevailing all over India is in accordance with the latest pronouncement of the Judicial Committee, quoted above. In *Ananda Rao v. Bansinath*, 3 N. I. R., p. 35, the learned Judicial Commissioner of the Central Provinces, following the aforesaid decision of the Privy Council, has held that if a widow effects an alienation of her husband's estate without legal necessity, and if the immediate reversioner, her daughter, stands by and allows the period of 12 years to elapse after the death of her mother without impeaching the transaction, her right to do so may be barred; but the remoter reversionary interest of her son, as the daughter's son of the deceased male owner, who represents the present contingent but ultimate full ownership in the estate, will remain unaffected by the lapse of time. We have to see whether this view of the matter is within the scope of the Articles 140 and 141 of the Limitation Schedule. With reference to the reversioner's claim for possession of the estate when his or her right accrues, what distinction is there between Articles 140 and 141, I have been unable to discover. *Qua* reversioner's claim for possession on the death of a female heir, Mr. U. N. Mitra has not attempted to show what difference there is between those two Articles. Whatever that may be, where is in the wordings of those two Articles any justification for the view that it is only the "male" reversioner, or the Hindu or Muhammadan "male," that is intended by the law? If in the case before the learned Judicial Commissioner, Gajrabai, the daughter, could assail the sale and mortgage for want of legal necessity, she could do so within 12 years from her mother's death, recovering possession, not because she was the daughter of Sitabai or her heir, but because she

Scope of Article 140  
and of Article 141.

Reversioner Article  
140 or 141—Any distinc-  
tion?

was the full reversioner on her mother's death,—tracing her claim from her deceased father, Arjun Rao. It was another matter, again, if the family were Mahrattas of the Southern School. This was not in the pleadings of the case; and so need not be considered. Mr. Drake-Brockman, the learned Judicial Commissioner, had the point, now being considered, in his view: and he preferred to dispose of the question by citing a few recent rulings,<sup>1</sup> and remarking, as the reason, “that no privity of estate exists between one reversioner and another, as such, and therefore, an act or omission by one reversioner cannot bind another reversioner who does not claim through him.” The cases cited no doubt support him. The learned Judge could also have quoted another extreme case, *Hanuman v. Bhagauti*, I. L. R. 19 All., 357. There, the widow sold, without legal necessity, the estate before 1857, and she died in 1857. She was succeeded by three daughters, the last surviving one of them died in 1890. If the said daughters jointly and severally were entitled to sue, or rather if they could be regarded in the light of the representative claimants or the plaintiffs, within the meaning and the wordings of Article 140 or 141, they allowed over  $2\frac{1}{2}$  times the prescribed statutory period to elapse; and their sons instituted suit for possession nearly 33 years after the improper alienation. Their claim was held to be within time. It is needless to push the consideration of the question farther. It must be held to be concluded by authorities all over. But I cannot help remarking that the controversies as regards adverse withholding against the female heir being also adverse or not against the reversioner raged long and wide in the country, till, within recent times, a series of Full Bench decisions and the Rulings of their Lordships of the Privy Council have, it may be said, set the point at rest. But these cases do not go expressly so far as to say that the unauthorized alienee will never have the rest from the Law of Limitation in force in the Country, so long as between his alienor—female and the next male reversioner with full rights of ownership over the property there will intervene female heirs with restricted rights of the same nature as the original alienor was possessed of.

1. *Rani Anand v. The Court of Wards*, 6 Cal., 764 P. C. *Manmatha v. Rohilli Moni*, 27 All., 406. *Abinash v. Haginath*, 32 Cal., 62. *Govinda v. Thayammal*, 28 Mad., 57.



If it be said that the rulings have gone the length of saying this, I will yet humbly contend that I could find no satisfactory *ratio decidendi* explaining why the scope of the Limitation Articles should be restricted in that manner.

The reason why the adverseness against the intervening female heir is not adverse to the male reversioner is  
P. C dictum. to be found in the dictum of the Privy Council in *Runchordas's* case in I. L. R., 23 Bom., 725. Their Lordships said:—"The learned counsel for the appellant relied on section 28, which provides that at the determination of the period limited for instituting a suit for the possession of property, the right to the property shall be extinguished. The obvious answer to this argument is, that in this case the period limited is not determined." All academic contentions based on the theory that the female reversioner completely represents the reversion for the time being are necessarily silenced by this emphatic declaration of the highest and the final Court of Justice of British India. If the prescribed limitation period is not determined during the tenures of life of any class or kind of female holders of property, it necessarily follows that the next male reversioner with full title to the property will have full period of 12 years to sue for possession. Not only that, it has been held<sup>1</sup> that if the intervening female heir sued after the lapse of 12 years from the date of the death of the late female to recover the estate, and her suit was dismissed as barred by limitation, the dismissal of the  
Not *Res judicata* suit would be no bar,—"because there was no trial of any right within the meaning of the rule laid down by their Lordships of the Privy Council in the *Shivagunga* case."<sup>2</sup> In other words, if the claim had been within time, and, without fraud or collusion, the questions of validity of the transfer, legal necessity, or its absence etc., had been decided, such decision would finally conclude the reversion. In a later ruling,<sup>3</sup> the Court followed the same view on the limitation question.

1. *Amrit v. Bindesri*, 23, All., 448.

2. 9 Moore's Appeals, 543, at p. 608.

3. *Jhamman v. Tiloki*, 25 All., 435.

Upon the foregoing principles depends the right of the remoter reversioner, with prospective chance of absolute interest in the property, to intervene betimes to protect his future interests from alienations without legal necessity and the laches and omissions of the intervening female reversioners whose rights under the law never extend beyond the limits of their lives. A distinction in this respect has been made and recognised by the Courts in India,—notably in the decisions of the Allahabad High Court upto a few years ago. Yet, there is no other High Court in India wherein the spectacle of the house divided against itself,—to quote the language of Dr. Ashutosh Mookerjee, a Judge of the High Court of Calcutta,—is more pronounced in this respect. In *Abinash Chandra Mazumdar v. Harinath Shaha*, I. L. R., 32 Cal., page 62, Mr. Justice Mookerjee has held that a declaratory suit by the remoter reversioner who would take an absolute interest, is maintainable in the presence of the immediate reversionary heir who is only the holder of a life-estate, under Section 42 of the Specific Relief Act (I of 1877). Because, said the learned Judge, if the nearest reversioner precludes himself (?) from maintaining a declaratory action by omitting to sue within the Statutory period, and thus practically concurs in an alleged improper alienation, that is, an alienation without the legal necessity, the remoter reversioner is entitled to maintain the suit. The learned Judge, having discussed the current views of all the High Courts on the point, referred to a Madras decision,<sup>1</sup> as laying down the correct view of the law and dissented from *Ishwar v. Janki*, I. L. R., 15 All., p. 132.

When a widow is out of possession, not by virtue of any alienation by her, voluntary or in execution of a decree, of any part of her husband's property, the reversioner is not entitled to sue for possession. But he is not without his remedy. We have seen that the claim of the remoter reversioner when his claim is permissible, the claim of the next reversioner when the widow is turned out of the estate by decree, and the claim of the reversioner when the widow alienates inherited movables, are governed by different Articles of

Widow out of possession,  
Reversioners :  
Limitation.

<sup>1</sup> *Govinda v. Thyammal*, 14 Mad. L. J., 209.

the Limitation Act. But the cause of action, in all those cases, is grounded on the want of legal necessity of the transactions which bring about the alienation. The point I am now considering is unconnected with the question of legal necessity. It is rather connected with the obligation of the widow to recover the missing estate. If the widow does not move, the reversioner is entitled to sue for the declaration that the estate be labelled with the contingent reversionary interest during the life-time of the widow. The widow and the party in possession are, of course, the necessary parties. But his right to sue will depend not on the bare supineness of the lady, but on the position, statement and proof that the party in possession has set up a right, antagonistic or prejudicial, to the heritage. In a case<sup>1</sup> of this sort, the Madras High Court entertained the reversioner's claim with hesitation, holding that such a claim was not controlable by any specific Article of Limitation; that therefore it fell under the omnibus clause, Article 120, and that the reversioner's claim must fail because more than 6 years had elapsed since the accrual of the cause of action.

<sup>1</sup> *Ramaswami v Thiruvammal*, 26 Mad, 488.

## CHAPTER V.

### Females and Reversioners: Their Rights and Remedies.

I proceed to consider what are the remedies and the law of  
• limitation in respect of moveable properties  
Moveables—Limitation. alienated without legal necessity. We have  
already seen, that under the law and the  
authorities that exist, inherited moveable and immoveable properties stand on the same footing in relation to the powers of the female heir.<sup>1</sup> Therefore, her rights and restrictions are identical. Sec. 42 of the Sp. Relief Act (I of 1877) makes no distinction between moveable and immoveable estates; whereas, Art. 125 of the Limitation schedule which has been framed on the lines of that section, relates only to immoveable properties. Arts. 140 and 141 of the same schedule refer also to immoveable estate. The doctrine of Hindu law, as we have seen, is that the female heir is the absolute owner of both kinds of properties during her life, and that she is free to dispose of them for the term of her life irrespective of the restrictions of legal necessity. We have seen, further, that with respect to immoveable properties disposed of without any justifying cause, the reversioner has the privilege to sue at once for a declaratory relief, and also to make a possessory claim, when the female dies. But with respect to moveable property, which, from its nature, is more perishable and easily disposable, and for which, if improperly alienated, a more speedy remedy is desirable, we do not find appropriate clauses in the Limitation schedule for a declaratory or a possessory action. It has been further observed that the surplus incomes and accumulations of the deceased's estate are, in absence of any direction or intention to the contrary, treated as a chip of the same block.

Under the general scope and classification of the Limitation clauses, suits for or relating to immoveable property are governed

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1. J. C. Digest of rulings of the Judicial Commissioner, C. P., Part VIII, 61. *Khushal v. Dalsing* 1 C. P. L. R., 77. *Madhavram v. Dave*, 21 Bom., 739. *Harilal v. Pranavalavdas*, 16 Bom., 229. *Bhagwandeem v. Myna Bae*, 11 M. L. A., 487.

by 12 years' rule, and those for or relating to moveable property, by 3 years' rule, with certain exceptions. As said above, there being no appropriate Article in the Limitation Act for a claim for moveable property, when it is made on the basis of prospective or vested inheritance, article 120 of the Limitation Act should apply. When an improper alienation of moveable property takes place, the reversioner's claim, whether the remedy is sought during the life-time of the widow or after her death, is grounded on the right of succession, either expectant or vested : and it is clear that if a female heir makes an alienation of inherited moveable estate without legal necessity, and the reversioner takes no steps during her life-time, he should have, considered analogically and on the grounds of natural justice, the same remedies as in the case of any other kind of heritable estate.

If the widow is causing a considerable spoil or destruction of the estate which is "waste" as understood in the English law, and the reversioner wishes to institute a suit for an injunction to restrain the waste, his suit will lie on the lines of illustration (m) to section 54 of the Specific Relief Act. The illustration is as follows :—

Waste—remedies against.      Act I of 1877, Sec. 54, Ill. (m).

"(m). A Hindu widow, in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her so doing. The heir expectant may sue for an injunction to restrain her." The cases reported in

Injunctions.

*Oojalmami v. Sagormonee*, Taylor, 370, and *Hurrydoss v. Rungumonee* Vyv. Darpan, Eng. Ed., p. 124 are instances in point. A remedy, however, by injunction is an extraordinary remedy in cases of alienations of moveable and immoveable property, and it can only be granted under the pressure of extraordinary circumstances. In the second case, cited above, there were allegations of collusion between the defendants, and the plaintiff's bill charged them with acts of fraud against the reversioner's interests. There were plans for committing further wasteful alienations which tended to endanger the material interests of the reversioners. Finding these facts established, the Court overruling the defendant's demurrer held that a suit for injunction did lie. On this point, the Chief

Justice observed as follows :—" A bill filed by the presumptive heir in succession against the immediate owner, who has succeeded by inheritance, must show a case approaching to spoliation, or must enable the Court to see that there is a probable ground for apprehending that, unless injunction be granted to restrain some threatened or impending act, ultimate loss to the heirs, who may come into pos-

session by succession, will ensue." But bare  
What is Waste. collusion with the alienee, needless expenses,

improper gifts, bare luxuries, charities, ordinary alienations, are not the sorts of cases contemplated for such an extraordinary remedy. The early cases of *Hurrydoss v. Rungomoney*, 2 Sev., 657, and *Govindmani v. Shamlal*, B. L. R. Sup. Vol., 48 (at p. 53) : W. R. Sp. No. 165, a Full Bench decision of Calcutta, dated 7th April, 1864, are ample authorities even now to enable the reversioners to have the widow restrained from working destruction of the property. But alienations like quarrying leases of land which involve digging, extensive profits to the miner, and a bare ordinary rental to the widow, are not acts of waste<sup>1</sup> for which she could be restrained from leasing the estate. The tendency of our Courts from the very beginning has been to elevate the position of the Hindu widow, to recognize her status as a juridical person, and to make her represent the estate more fully than before.<sup>2</sup> At page 273 of the same volume (8 W. R.), *Lalla v. Musst Wooma*, it has been suggested that the Courts may prevent wastes which threaten to destroy the corpus of the estate. In a very early decision<sup>3</sup> in Calcutta, waste on the part of the widow was proved. The report unfortunately does not state in what way the Courts below came to that finding. Basing their decision on that finding, Lock and Glover, JJ., held thus :—" The Court should not have converted the reversioner into an actual proprietor. It should have appointed a manager accountable to the Court for all his acts in respect of the estate, who should be required to render accounts periodically, and be put in possession of all the property in the widow's own possession.

Waste, removal of  
widow or, restraining  
orders.

1. *Subba v. Chengalamma*, 22 Mad., 126.

2. *Ramdyal v. Kattayani*, 8 W. R., 256.

3. *Musst. Moharani v. Nuddu*, 10 W. R., 73.

Leases which have been given by her cannot be interfered with..... unless the lessees be making waste ; and if the charge be proved, then the Court can take measures to preserve the property given in lease. There is nothing to prevent the Court from appointing the reversioner to be manager if he be a fit person for the appointment."

In *Manmatha Nath v. Rohilli Moni*, I. L. R., 27 All., 406, the case was one of will executed by the late Owner who created reversionary interests by his bequests. The facts of the case, relating to the alleged wastes by the widow, were not given. But the learned Judges have said that law does not prevent the reversioner from claiming an injunction restraining the life-tenant from wasting the property in suit. In a partition case<sup>1</sup> instituted in the District of Rajshahi, in Bengal, the plaintiff is the childless widow of a rich family consisting of two brothers. The brothers, while alive, lived jointly and peacefully. Both died, one left a son, the defendant ; while the other died ; leaving a widow. Such widows generally play in the hands of their paternal relations especially when there are temptations for gain in claiming partition of her husband's share, under the advanced doctrines of Jimutabahana in Bengal in favour of the Hindu widows, and in opposition to traditions and the instincts of the Hindus of the rest of India. The partition had to be decreed ; but as regards the moveable properties, which were of considerable value, there was reasonable apprehension of waste by the plaintiff as soon as she would get possession thereof. The learned Judges did not consider the question of the income of the estate, or rather, of the share thereof that belonged to the plaintiff's deceased husband. Presumably that income was sufficient and to spare for meeting all the demands of luxurious living by the plaintiff, her brothers, and all classes of her paternal relations. The absolute control of the widow over the current incomes is what the learned Judges should have considered. But the point that was discussed was the accumulated cash and moveables which constituted the widow's inheritance, and regarding which the plaintiff had no right of disposal without the justifying grounds of legal necessity. The Court grounded the apprehension of probable waste from a few overt acts on the part of the

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1. *Durga Nath v. Chintamani*, 31 Cal., 214.

plaintiff and her advisers which were apparent on the face of the record. Much evidence in the case had not been adduced ; because the First Appeal to the High Court was on a preliminary decree for partition. Yet, that was considered enough to give clear directions in the Remand Order for safe-guarding the interests of the defendant, the reversioner. The Court said:—"We, therefore, think that it is very desirable that in the final decree in the suit, sufficient provision should be made for the prevention of the misuse by the plaintiff of the cash money and other moveables that may be allotted to her share. *As regards the immoveable properties, however,* no such direction is necessary. We leave it to the lower Court to decide, after the allotment is made, and after hearing the parties, what directions should be given for the protection of the future interest of the person who may be entitled to the property after her death. The direction of the Court will depend to a great extent on the nature and amount of property that the plaintiff may be declared entitled to, on actual partition. Such direction should be embodied in the decree."

Regarding immoveable property in the possession of a female heir, I have emphasized the above remarks in the judgment of the High Court of Calcutta in order to shew that ordinarily there can be hardly any waste of such properties. It is rare to find reckless instances of pulling down valuable and substantial houses, or denuding rich gardens or forests. But regarding inherited moveables, like cash, valuable ornaments, hoarded gold, silver, and precious stones, pearls, &c., cases of apprehended and actual waste do sometimes crop up, to prevent which there is ample provision in the law in favour of the reversioner. If reasonable apprehension of waste is sufficient to induce the Court to adopt preventive measures, surely it would be conceded that actual wastes or threatened wastes would afford a good cause of action.

It should be remembered that relief by way of perpetual injunction on the lines of Ill. (m) to Sec. 54 of the Specific Relief Act is a matter of discretion to the Court ; and the discretion of the Court is fettered with numerous conditions detailed in the body of the section. When, in extreme

Limitation for *Ditto*.



cases, such an action is filed, it is subject to the limitation of three years as prescribed by article 41 of Schedule II of the Limitation Act XV, which runs thus :—

“ 41. To restrain waste, 3 years, from when the waste begins.”  
As regards the frame of suit compare Forms 100 and 103, Sch IV, Act XIV of 1882.

The ordinary remedy in cases of improper alienation of inherited moveables by a female heir will be by a declaratory suit during her life, and a possessory action for the moveables after her death. These actions are analogous to the suits prescribed by Arts. 125 and 141 for immoveable property, wherein the period of limitation for each case is 12 years from the

Limitation for declaratory or possession of moveables.

accrual of the cause of action. In the absence of any other appropriate article in the schedule, article 120 will govern both classes of suits. The starting point for each kind of suit will, of course, be different. If a declaratory action is brought during the woman's life-time, the right to sue, accrues from the date of alienation. The prayer for relief will be couched in the same language as has been expressed in article 125, viz., to have the alienation made by the female declared void after her death, civil or natural. The result of the decision will have the same effect as in the case of immoveable property. As the reversioner is not entitled to the estate so long as the female is alive, he can claim nothing more than a judicial declaration that the alienation will not endure a moment after her death. This will pave the way for the reversioner claiming and getting possession of the estate when the estate falls into possession.

Art. 120, Schedule II, Limitation Act. If, as in the case of immoveable property

improperly alienated, the reversioner bides his time and sues for the estate in the hands of an alienee, he has, for the moveable estate, got 6 years under the same article (120) of the Limitation Act to bring his action.<sup>1</sup> In the Madras case, a daughter sued to recover her share of Government promissory notes in the possession of a son of the deceased after his death. The claim was based on the allegation of the property being her mother's *Stridhan* of which she claimed a third share, being one of three

<sup>1</sup> Sithamma v. Narayana and others, 12 Mad., 487. Compare Umardaraz v. Wilayat Ali, 19 All., 169.

sisters. The mother died more than 6 years before suit, and the son was found to have been all along wrongfully in possession of the property. The suit was dismissed as barred under section 120 of the Schedule. In a case before the Privy Council<sup>1</sup> the claim was for a share in the estate consisting of moveables, cash, deposits &c, on the ground of inheritance. The claim was made by a Mahomedan widow against her deceased husband's brother in wrongful possession thereof. The Judicial Commissioner of Oudh held that the suit was governed by article 123. The decision of the Privy Council was otherwise, and their Lordships observed:—"Their Lordships do not agree with either the Judicial Commissioner or the District Judge as to the article in the Schedule to the Limitation Act which is applicable. This is not a suit for a distributive share of property (art. 123) nor a suit for specific moveable property wrongfully taken (art. 49). This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Art. 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the Schedule. Their Lordships think this article should be applied, unless it is clear that the suit is within some other article, which in their opinion it is not."

Thus, then, the period of limitation to recover moveable property from the hand of an improper alienee after the death of the female heirs is governed by article 120 of the Limitation Act. Even if there be any difference of opinion as regards the share of moveable estate claimed on the footing of inheritance (but in the face of the P. C. decision just quoted there should be none),<sup>2</sup> a reversioner's claim for the recovery of moveable property wrongly alienated, from a stranger in possession thereof cannot derive the benefit of 12 years' rule by any analogy of article 123. Thus, to a declaratory claim during the life-time of the widow against an improper alienation of moveable property, in absence of any other article, article 120 would apply: compare the celebrated *Chakdigi* case in Bengal, *Chuckunlal Roy v. Lalit mohun Roy*, I. L. R., 20 Cal., 906 (pp. 924—25): A suit for sale on the

<sup>1</sup> *Mahamad Riasat Ali v. Hasin Banu*, 21 Cal., 157 *vide* also 19 All., 169.

<sup>2</sup> *Kasmi v. Ayishamma*, 15 Mad., 60. See 20 All., 35; 26 Mad., 417.

Moveables pledged:  
Limitation for suit for  
sale.

pledge of moveable property is held to be governed by art. 120, *Nimchand Baboo v. Jugabundhu Ghose*, I. L. R., 22 Cal., 21. The decision of the Calcutta High Court reported in I. L. R., 20 Cal., 906 was reversed on appeal by the Privy Council—See *Lolit Mohan v. Chackan Lal*, I. L. R., 24 Cal., 834. But that was on a different point. The actual decision of the case was left untouched, *viz.*, that the suit having been brought within six years from the time of the widow's death, when the plaintiffs as reversionary heirs became entitled to possession or other consequential relief, the suit was amply within time. The Madras High Court<sup>1</sup> has expressed a doubt and said they could not understand on what principle the starting point under article 120 was taken to be the time of the widow's death.

It has been seen, in the foregoing pages that if the female heir in possession of immoveable and moveable estate commits "acts of extravagant or destructive waste," and thus the property is not really "used but abused", she may be restrained by injunction as contemplated by Ill. (m) to Sec. 54, Act I of 1877:—*vide* Collet on Sp. Rel. Act, page 300. In page 302, para 2, the learned author contemplates the possibility of a remoter reversioner restraining the female heir and the presumptive reversioner, in collusion, from committing waste. He may sue them to prevent such waste being committed, or, may even compel them "to refund the share of the spoil." There have been extreme cases of waste whereupon reversioner sued for the removal of the widow from possession of the estate. Dr. Mitra in his Tagore Law Lectures of 1879, p. 423 observes on this point, as follows:—"This remedy

Extravagance and  
waste by the female heir.  
Reversioner in collusion.

is an extraordinary one, and will be granted only under extraordinary circumstances. It has the effect of trenching upon the rights of the widow, who is entitled by law to the possession of the property of her husband during her lifetime; and such a trespass upon the widow's rights will not be permitted unless there is an equally serious trespass upon the reversioner's right which it is

<sup>1</sup> *Raja of Venkatagiri v. Isakappali*, 26 Mad., 410 (p. 416).

necessary to prevent. I may observe here, that no text of Hindu Law can be quoted as an authority to warrant the removal of the widow from the possession of the estate which she has inherited from her husband; but the Courts of Justice have applied this remedy to supply what they considered an omission in that law. When the acts of the widow became seriously injurious to the rights of the reversioners, the Courts applied this remedy. The power of the widow to commit further harm was restrained, while she was left in the enjoyment of all the substantial benefits derived from

her husband's estate." The learned author then quotes instances of some early decisions

of the Sudder Dewani Adalat, wherein, for bare acts of alienation without legal necessity, and to save the future reversionary interest, the Courts decreed removal of the woman from the possession, transferring the entire estate to the claimant, and making suitable maintenace allowance for the female heir. This view, as Dr. Mitra points out, is altogether erroneous; and the later decisions have recognized and rectified the error. "The present state of the authorities on this subject will not, I think, justify a Court in removing the widow from possession of the estate when she is only guilty of an alienation in excess of her powers as a Hindu widow, —an alienation which is only binding during the widow's lifetime, but which is not binding on the reversioners;" See *Brinda Chowdrain, v. Pearylal*, 9 W. R., 460. It will be useful to sum up the views of Mr. Mayne and of Dr. Mitra, with the authorities quoted by them to indicate the circumstances under which the reversioner's claim for extraordinary relief has

Extraordinary reliefs when claimable. Instances.

been considered.

(1) When the allegation is that there is a scheme or a design to make alienations, an injunction suit to restrain the anticipated alienations will not lie, because the alienations may be valid for legal necessity, which cannot be put to issue and decided by anticipation.<sup>1</sup>

(2) You must allege and prove specific acts of waste, mismanagement, or misconduct, or you must prove against her some

<sup>1</sup> *Pranputtee v. Mt Pooran*, S. D. of 1856, 494: *sc.* on review *Lalla Fatechand v. Mt Pranputtee*, S. D. of 1857, 381.

positive act of fraud to injure the interests of the reversioner, or you must make out a case that she is no longer capable of being trusted to deal with the estate in a manner consistent with her limited rights;—if you make out a case like the above, an equitable relief may be granted by way of removing her, a manager or a receiver appointed to hold the property in trust, and the proceeds utilized in a manner consistent with the rights of the parties. To quote some instances,—

(a) A widow attempted to sell the property on the ground of Removal of the female heir. a debt of her husband which she could not otherwise pay. It appeared that no debt existed, and that the representation was false, the widow was removed from possession.<sup>1</sup>

It does not appear that the aforesaid ruling of the Calcutta High Court has ever been reviewed or discussed in any other reported case upto the present moment; though it cannot be that alienations under such fraudulent circumstances have not come up before Courts. The correctness of the view of law stated in the head-note of the ruling cannot, of course, be questioned. It relates to the principle of burden of proof in such cases. It is an established fact, that when the validity or otherwise of an alienation by a Hindu widow is in dispute the *onus* to prove the justifying ground of legal necessity is on the alienee. The widow's avowal, verbal or written, will not go far, if at all, to lighten the burden. But that is a quite different matter from what has been decided by the learned Judges in the body of their decision. The ruling, it will be remembered, is of 1864, when, it may safely be said, the English Judges of this country, imbued with their notions of English Law on the subject, made their early attempts to expound the rights of Hindu widows by the analogy of the rights of the holders of life-estates under the English Law. It would be revolting to the present generation of men belonging to the legal profession to be told that an alienation by a widow under false pretences would entail a forfeiture. The decision of the Sudder Ameen in the case cited above was undoubtedly the correct view of the law. The Judges of the

Correctness of 2 W. R., 170 doubted.

<sup>1</sup> Moonshée Casheemuddin v Ramdas, 2 W. R., 170

High Court reversed the Lower Court's decree and ordered, by way of remand, to remove the widow from her estate of inheritance if it was found that she was guilty of fraudulent misrepresentation in the sale of her estate. The possibility of such a decision is, I may safely say, beyond the dream of any litigant in these days. The law on the subject of the Hindu widow's rights has sufficiently been threshed out by Courts within the last half a century.

Early struggles like the above to deduce the correct view of the rights of Hindu widows and of female heirs generally are evidenced in many other old rulings. It was, for instance thought that the debts of the deceased husband which were barred by limitation, or which were of immoral or sinful nature, afforded no justification, on the ground of legal necessity, to alienate or to encumber the estate of the deceased male owner.

On this subject Mr. Mayne (*Hindu Law and Usage*, 7th Ed., para 633, page 850) observes :—

“The obligation of a widow taking her husband's property to pay his debts comes under the head of religious benefit unless they are contracted for immoral purposes. She is under the same obligation to discharge them as a son would be.”

But with great deference to the learned author it may be remarked that a Hindu son, unless he inherits his father's self-acquisitions, is not bound to pay all sorts of debts of his father, sinful or not. Similarly the doctrine of spiritual benefit to the soul of the deceased husband does not, it is apprehended, recognize any distinction between proper and improper, moral and immoral, barred and subsisting debts that might be owing by the deceased husband. The learned author has quoted a ruling of the Calcutta High Court<sup>1</sup> which relates to the debt incurred by a trespasser *Shebait* and an encumbrance created therefor. The debt was an antecedent one and it was apparently barred by limitation at the time that the said debt was revived and an encumbrance was created. But a Hindu widow is not a trustee of her husband's estate like the custodian of a *muth* or a *Shebait*. She is a juridical person of much higher *status*. Her interest for ordinary purposes is co-extensive with that of her deceased husband. Consequently her

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1. *Ram Churn v. Nunhoo*, 14 W. R., 147.

liability for any kind of debt, which could have been enforced against her husband, is also co-extensive. "In more recent cases," says the learned author, "it has been repeatedly held that a widow's obligation to pay her husband's debts, and her right to alienate property descended from him for that purpose, is not affected by the statute of limitations, or any similar contrivance for getting rid of his obligations."<sup>1</sup>

(b) A widow set up a forged *kobala* exhibiting her husband's debt. She colluded with certain persons and parted with the estate stating that the same was sold under the *Kobala*. The Court held it to be a case of "a positive fraud on her husband's estate and the reversioners," for which the latter could bring a suit to have the estate protected and the widow removed from the management.<sup>2</sup>

(c) If the immediate reversioner is guilty of such fraud or collusion with the widow, the next reversioner can sue.<sup>3</sup>

(d) If the widow gives up the estate to a third party under the threat of legal proceedings which may be a hoax, and refuses to do anything with the assets, that is held to be practical abandonment by her. The reversioner may sue the widow and the third party to have the possession restored to the proper custody and a manager appointed.<sup>4</sup>

(e) If for mental derangement, extreme perversity, or for similar reason the widow appears to be unfit to deserve trust or confidence for management of her estate, the heir-at-law may come in to protect the estate.<sup>5</sup>

<sup>1</sup> Chinnaji v. Dinkar, 11 Bom. 320, Bhan Babaji v. Gopala, 11 Bom. 325, where the same principle was applied to a widowed daughter-in-law in possession of the estate of her father-in-law, Kondappa v. Subba, 13 Mad. 189, Udai Chunder v. Ashutosh, 21 Cal. 190.

<sup>2</sup> Shama Sundury v. Jamoona, 24 W. R. 86,

<sup>3</sup> Kooer Golab v. Rao Kareem, 14 M. I. A. 193, 24 W. R., 86, foot-note.

<sup>4</sup> Radha Mohun v. Ramdas, 24 W. R. 86, f. n. Joymoorath v. Buldeo, 21 W. R., 444.

<sup>5</sup> Nundlal v. Bolakee, S. D. of 1854, 351 Gouree Kanth v. Bhugobutty, S. D. of 1858, 1103.

(f) If a lease, possessory mortgage, or sale is effected without legal necessity, or a temporary alienation is effected with legal necessity reserving the ultimate beneficiary interest of the reversioner and the party in possession damages or wastes the estate irretrievably, an injunction suit will lie.

(g) If the widow in possession leads a grossly scandalous life, and trusts the management of the estate to incompetent hands and wastage and spoliation ensue, a receiver may be appointed.<sup>1</sup>

The appointment of receiver is now regulated under section 503 &c. of the Code of Civil Procedure, the provisions of which may be consulted. In the second case quoted above, the claim was by a co-widow against the senior widow in possession against whom none of the material allegations of unchastity, scandal, &c. were proved, hence the appointment of a receiver was refused.

Nothing to the purpose will be served by references to the English cases decided in the Courts of Equity for securing the interests of owners for life and owners in remainder.

Because those principles of English law are not at all applicable to the property in the possession of the Hindu females in India. A case has to be made out,—and a case sufficiently strong with facts and figures to induce the Court to interfere. In *Huree Dass Dutt v. Apoorna Dassee*, 6 Moore's Indian Appeals, p 433, at page 445, the Privy Council have held that a Court of Equity will not interfere, unless it is shown that there is danger from the mode of the widow's dealing with her cash. She kept it in her hands for 3 months only, thinking how best to invest it. 'This is no waste.' Reasonable detention of capital by one entitled to hold the *corpus* of the estate, moveable as well as immoveable, for her life, and entitled also to the full liberty to enjoy and to spend the income at her pleasure, is absolutely within her powers. I think I can go farther. She has absolute liberty to leave untouched all the hoarded and unproductive wealth of the deceased male owner,—in gold, silver, currencies,

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1. *Hanumayya v. Yenkata Subhayya*, 18 Mad., 23. *Sidheswari v. Abhoyeswari*, 15 Cal., 818.



precious stones, pearls, &c; and she can, if the current income is sufficient to enable her to live well and to spare, add to the dead stock, without a word of protest by any one. I have seen no case, nor can I see the possibility of one, wherein the woman was or could be enjoined by the Court to invest money in remunerative concerns. What reply will the Court give to the widow if in such an action by the reversioner she were to plead that she preferred to preserve the estate and to live perfectly contented and happy with the income of the estate already coming to her hands? Troubles begin, in the generality of cases that have taken place, mostly in Bengal, when the widow's dissensions occur with her deceased husband's coparcenars. Luckily or unluckily for Bengal, there are the very advanced theories of Jimutabahana laying down that the wife, daughter, &c. will represent the deceased coparcener's interest in the joint estate. This is nowhere else in India where the doctrines of Mitakshara prevail, and where it is the settled view

Dayabhaga v. Mitakshara  
widows.

of law that the interest of a joint member in the coparcenary lapses, and that, by a sort of invisible process, the same passes by survivorship to swell the interest of the survivors. The wives, daughters, &c of the deceased parcnars are barely entitled to maintenance. By a single stroke of the pen, as it were, a broad landmark of distinction has been laid out between Dayabhaga Bengal and Mitakshara India, by giving the reversioner of the Bengal School a broader range of litigation in respect of his right of impeaching any improper alienation by the widow.

Then there have been the constant games of fast and loose in Bengal. In no other part of India, there are so many *Slokas*, texts, and precepts laid down for strict frugality, rigid austerities, and economic restrictions as prevail to reduce the rights of the female heir in the Province of Bengal under the sway of the Dayabhaga. We will now cite some instances bearing on this point.

Babu Golap Chandra Sarkar, Vakil, High Court, Calcutta, says, in his *Hindu Law*, Third Edition, 1907. p. 397—"Thus the reversioner's interest is not so fully protected, as it is under the provisions made by the Dayabhaga for the control of the husband's kinsmen over the widow's management. When cash, or

Golap Chandra Sarkar on  
ditto.

moveable property easily convertible into cash.....comes to the widow's hand, it would be almost impossible for the reversioner to get any remedy in most cases, if the Court would not interfere unless he could prove danger to the property from the *mode of her dealing* with it : for she may secretly deal with such property so as to deprive the reversioner entirely. The danger apprehended is the gift to the widow's own relations, of which no trace can be found by the reversioner. In such cases, it seems reasonable to presume danger without waiting for the mode of dealing, and to apply those equitable principles....." to safeguard the reversionary interest.

Excepting the fact that there have been many more cases under this head, in the Province of Bengal than those in all the rest of India put together, there is no reason for considering that under the Mitakshara Law, the reversionary interest is not so well protected as in Bengal. The reversioner's interest is placed on the solid basis of general Hindu Law of which Dayabhaga, Mitakshara, Vyavahara Mayukha, &c are bare expositions for local application and usage. We can any day conceive the possibility of a Hindu heiress kept out of her inheritance by a trespasser. He may be, ordinarily speaking, the next reversioner. The estate to be recovered may be a huge lot of moveables : and one like Grose, in *Grose v. Omer-tomoyce*, 12 W. R. 12, O. J. A., may come forward to speculate with the woman to advance her money for litigation to recover the estate. Grose covenanted with the lady that he should retain half the estate for his trouble and labour, and that out of the remaining half he should reimburse himself all his advances and expenses with interest at 12 p. c. per year. If the defendant happens to be the reversioner, he can in the suit take the pleas,—or if the trespasser on the woman's inheritance be an outsider, the reversioner may very well bide his time, and when the estate is recovered, he can protect his future interest either by declaratory or possessory action praying,—that the covenants of such sort may be avoided as grossly inequitable and impolitic. In the aforesaid case, Peacock, C. J. held, on appeal, that the first condition of wholesale assignment of half the estate was not binding on the reversioner being champertous and unconscionable. But he ruled that the necessary advances for litigation to recover the estate formed a binding charge on the ground of legal necessity.

Even under the rigid Mitakshara doctrines prevailing in the United Provinces, we have an early decision<sup>1</sup> of the Allahabad High Court, coming up as a First Appeal from the District of Azamgarh. Distant reversioner. of the Allahabad High Court, coming up as a Daughter impleaded. There, the distant reversioner sued the trespasser in possession, impleading the daughter of the late male owner as a party, after the death of his widow. It was alleged by the plaintiffs that the daughter was in collusion and that either intentionally or or supinely, she was refraining from claiming the estate. They alleged further that the property in the hands of the trespassers was being wasted and depreciated. Reviewing the facts of the case on their merits, the learned Judges reversed the decision of the Court below, allowed the daughter to come in as a co-plaintiff, and decreed the claim in the following terms:—

—Declare the rights of the plaintiffs as reversioners to the estate. Order possession thereof to the daughter Bunsraj Kuar. Direct that if she declines to accept possession, then the plaintiffs will be put into possession for her as her manager, acting under the orders and directions of the Court, filing accounts, and paying income through the Court.

Having seen the nature of the action which a reversioner is ordinarily entitled to bring and having also discussed some of the circumstances under which extraordinary reliefs may be granted, I proceed to notice certain special features in connection with the reversioner's suits.

(1) In *Rasul Jehan v. Ramsurun* I. L. R. 22 Cal. 589, plaintiffs prayed for recovery of possession by establishment of their right of ownership, or, in the alternative, for a declaration that they were reversionary heirs, and, as such, not bound by the alienation made without legal necessity (gift). The defendant died during the pendency of the suit. Though the plea of co-ownership failed, the reversioners' action for possession was allowed as the life-holder died before decree; and the plaintiffs were not driven to a separate suit. It was stated as a reason for the decision that the plaintiffs had already claimed possession in their suit in the

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1. *Adi Deo v. Dukharan*, 5 All., 532.

alternative. But it appears from decisions passed under Sec. 42, Specific Relief Act, that even without such a prayer in the original plaint, if the possessory right accrues after the institution of the suit, or if such a right had existed at the time of the institution and consequently, a declaratory decree could not be granted, a relief for possession is allowed to be added. Cases of this sort may at any time occur on the event of the widow's dying pending a declaratory action. It has been held that the addition of the possessory relief should not ordinarily be refused.<sup>1</sup>

A Madras case<sup>2</sup> is against this view. But in that case, the reversioner claimed amendment of the plaint, after the widow's death, when the case was in its appellate stage. That was disallowed; the Court observing that, as the suit was brought for declaration, and pending the appeal the widow died, the plaintiff was able to proceed notwithstanding her death; and the claim for possession could not be permitted to be added. With deference to the opinion of the learned judges, it may be asked, could they say the same thing if the widow had died during the progress of the suit in its original stage? It is curious that the decision in the case was given in October, 1888, and that by Act VII of 1888, which came into operation on the 1st day of July, 1888, Sec. 53 of the C. P. Code had been amended and expanded considerably by the addition of a new clause. Compare also Sec. 582, Civil Procedure Code. The same High Court in an earlier decision<sup>3</sup> held that if a plaintiff is dispossessed after filing his suit, he may add a prayer for possession.

(2) A reversioner cannot maintain an action to *set aside* the deed of alienation, because the alienation, even for want of legal necessity is valid during the widow's life-time. Compare *Jocla v. Dharum*, 10 M. L. A., 511. Strictly speaking, an action to set aside an instrument is governed by three years' rule of limitation

1. *Bai Anope vs. Mulchand*, 9 Bom., 355. *Limba vs. Rama*, 13 Bom., 548. *Chomu vs. Uma*, 14 Mad., 46. *The Bombay Burmah Trading Corporation Limited vs. F. Yorke Smith*, 17 Bom., 197.

2. *Govind vs. Perumdevi*, 12 Mad., 136

3. *Bishop Mellus vs. Vicor of Malabar*, 2 Mad., 295

(Art. 91, Act XV of 1877). In one case decided by the Judicial Commissioner, C. P., *Doula v. Totaram* (unreported) decided on 21st September, 1892, the plaintiff's suit was to cancel a deed of gift while the widow was living. The claim was dismissed throughout, and the Court did not allow the contention to treat and to discuss the case on the footing as if it were a claim for a declaration, and to stamp on the transaction the mark of invalidity after the widow's life-time. The prayer for present cancellation was not allowed to be converted into one for prospective cancellation. In another action, however, arising out of an analogous case under the C. P. Tenancy Act, the Judicial Commissioner treated the prayer in the plaint, that the mortgage-deed might be cancelled, as including a prayer for declaration.<sup>1</sup> The only difference being that in the Tenancy case, the transaction by mortgage was, by the law then in force, void as against the landlord from the beginning, while the reversioner can say no such thing during the life-time of the female.

(3) Sec. 42 of the Specific Relief Act provides, "that the Court may, in its discretion, make" &c. "In other words, "the Court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal"—Sec. 22 Act I of 1877. Prior to the passing of Sec. 42 of the Specific Relief Act of 1877 with its illustrations, it used to be doubted whether a declaratory decree of any kind was a matter of right. Conflicting opinions were passed while interpreting the vague and general language of Sec. 15 of the Old Civil Procedure Code, Act VIII of 1859, and the decisions, previously noted (L. R. 2 I. A., 159, 11 B. L. R., 203; *ibid*, 171; L. R. 5 I. A., 149) are cases in point. But all doubts have now been dispelled and the suit for declaration by the "person presumptively entitled to possess the property if he survive her" [III. (c)] has received direct legislative sanction. Ordinarily, there is no room for discretion. There may, however be circumstances, under which, even after the passing of that Act, as before, the Court has used its discretion against the claim.

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1. *Kashiram &c. vs Behari &c.*, 4 C. P. L. R., 40

(a) In *Mst. Hunsbutty Koerain v. Ishri Dutt Koer*, 4 C. L. R., 511, the widows had made a gift of their husband's property, and also of property purchased from accumulations, to the daughter. Discretion refused instances.

The daughter having died, leaving a minor daughter, a suit was brought by the reversionary heirs of the deceased father against the widows and the infant grand-daughter, for declaration that the deed executed by the widows in favour of the daughter did not and could not affect their reversionary interest. The Court did not think that any declaration was necessary, because the court refused to decide the intricate questions of law involved, and there was no certainty of immediate relief to any body.

(b) Rulings issued prior to, and upto the time of the passing of the Specific Relief Act which embodies an illustration under Sec. 42, relating to Hindu widows and their reversioners, present anomalous readings. The anomalies are due simply to one fact: and that is, the rights of the female heirs and those of the reversioners were not very thoroughly appreciated. This is clearly seen in the aforesaid ruling passed in 1878. In that case, the gift by the widow was to her daughter. The benefit of the gift was declared in favour of the daughter, and her daughter. After the death of the former, her husband and his daughter went on enjoying the gifted estate which consisted of landed properties which the donor had inherited from her husband, and of other landed estates, acquired with the earnings and the profits of the inherited properties. The next reversioner, who instituted the usual declaratory action to nullify the gift after the death of the widow was her deceased husband's separate brother's representative. There was, therefore, no question as regards the right of the plaintiff to bring the action. But the so-called intricate question of law was the fact that a part of the gifted estate consisted of the purchases with the income of the deceased's properties: and, probably, the next intricate question then was whether the reversioner's suit lay during the life-time of the widow, the life-incumbent. I will say at once that these are no questions of intricacy now. The Bench as well as the Bar of India have both made sufficient progress to appreciate the subject of the widow's rights and of the reversioner's remedies to require being told that there is any complication or

difficulty in the matter. It is very curious that while many previous Benches of the same High Court had passed decisions restraining the widow from waste,—removing her, at times, from the possession on the ground of her mismanagement, and arranging for the proper management of the estate in the interests of the reversioners,—we find in this and in some other decisions quoted below, doubts and hesitations to grant to the reversioners, the reliefs to which they are justly entitled. It was at once apparent that gift, by the very definition of the term, was an alienation without legal necessity. Then the facts of the case showed that the immediate donee being dead, her daughter and her husband (utter strangers to the estate) were with the sanction, as it were, of the donor-widow, enjoying the estate and wasting its resources. And yet the simple declaration that was sought was not granted to the claimant! It is worthy of note that the learned Judges who decided the case in 4 Cal. L. Reports, page 411 were confronted with the views of two previous decisions, not quite consistent with each other. Compare, for instance, *S. M. Paddomoni v. Dwarkanath*, 25 W. R., p. 533, and the decision of Mr. Justice Macpherson in *Grose's case* in 4 B. L. R., O. J. at page 42. In *Isri Prasad v. Lalli*, I. L. R., 22 All., p. 294, the learned Judges of the Allahabad High Court considered the aforesaid ruling; but they refrained from deciding the question for the sole reason that the claimant did not establish his reversionary right. The decision of Sargeant, C. J. of the High Court of Bombay in *Rivett-Carnac v. Jiribai*, I. L. R., 10 Bom., 478 is not a precedent for holding that the view of law propounded in 4 C. L. R., p. 511 is sound; because, the case related to a little fund, namely, the cash balance that belonged to the late owner. There are, on the other hand, rulings to show that the declaratory relief should always be granted if the act complained of were such as, if allowed to stand unchallenged, would be an injury to the estate of the next heir.<sup>1</sup> The declaration may also be refused at the discretion of the Court, if it appears that the lapse of time will not render it more difficult for the next heir to establish his right when the succession opens. For, if this be so, the litigation is premature and unnecessary.<sup>2</sup>

<sup>1</sup> *Nogendra vs. Sreenutti Kissen Sundari*, 11 B. L. R., 171; 19 W. R., 133. *Behary vs. Madho*, 13 B. L. R., 222, 21 W. R., 430. *Nilmoney vs. Kally Churan*, 2 I. A. 83; *S. C.* 14, B. L. R. 382; 23 W. R. 150. *Rampershad vs. Jokhou Roy*, 10 Cal., 1003.

<sup>2</sup> *Mayne*, 4th Edition, para 604.

(c) When it appears that the reversioner, apparently presumptive, is *ex mera motu* and suing for a declaration of his own interest, and not barely to impeach the alienation for want of legal necessity; or, where two or more contending reversioners wish to make the suit, otherwise well-brought, a sort of test case for a decision upon their conflicting rights *inter se*, declaration may be refused.<sup>1</sup>

(d) Bare remoteness of chance is no reason, *per se*, to refuse the declaration: as where an old man of seventy were to sue for declaration in respect of an improper alienation by a young widow of twenty. Discretion cannot be refused, if rights exist, however distant. The old man again may be heirless. The apparent chance that he may not survive the young woman is no reason to refuse the relief.<sup>2</sup>

(e) If a remoter reversioner sues for the declaration, impleading necessarily the immediate and the presumptive heir, the facts justifying the suit being set forth, Discretion refused on reasonable doubt arising and if in those facts there is any reasonable doubt on the pleadings between the two classes of reversioners *inter se*, declaration may not be granted.<sup>3</sup>

(f) Where the widow admittedly alienates her life-interest *only*, it being immaterial to the reversioner whether such alienation be set aside or not, the declaration will be refused, and the claim will be dismissed for want of cause of action.<sup>4</sup>

(g) A distant *sagotra sapinda* sued for a declaration of his right against a gift by the widow in favour of her married daughter. The Court while holding that *Idem*, for remoteness of chance, the suit was maintainable considered the chance of succession far too remote and refused to make the usual declaration.<sup>5</sup>

(h) The case of an alienee of the reversioner's questioning an improper transaction by the widow has seldom come before the Court. The first point that will arise in such a controversy is the validity or otherwise of the alienation itself upon which the plaintiff sues. The

1. Collet's Law of Specific Relief (1882) page 228.

2. Ibid, p. 229.

3. Ibid, p. 229.

4. Raj Bahadur vs. Achambit, 6. C. 1., R., 12.

5. Bhupal Ram vs. Lachma Kuar, 11 All, 253



principle of law embodied in Sec. 6 of the Transfer of Property Act will, it is feared, stand in the way of the plaintiff's claim. It has been held by the High Court of Calcutta<sup>1</sup> that the expression "heir apparent"

has a remote or a strained application to the reversioner's interest.

It is said that "It can scarcely be said that the right of a Hindu reversioner is a mere possibility. It is an interest contingent upon the reversioner surviving the widow, and also upon the non-intervention of a full heir. This is a contingency dependent on no man's will, but upon the happening of uncertain events. It is an interest which is capable of being protected by the Court; the reversioner can sue to restrain waste; he can-

on making out a proper case, obtain a receiver. Reversioner's remedies, and he can contest alienations made by the

widow. It is an interest which may at any time cease to be contingent by the widow giving up her estate. The reversioner with the widow can make a complete title to the property. The transfer of this interest is, in our opinion, not within the letter of the law, and, moreover, it is not within the mischief which the section was intended to counteract. More possibilities of succession are wholly incapable of valuation, whereas, with the aid of an actuary it is not difficult to put a money-value upon the interest of a reversioner."

The principles of law inunciated in the above ruling of the Calcutta High Court are open to to grave doubts. It is

Comments on the above, I. L. R., 25 Cal, 778 doubted impossible, in my humble opinion, for any actuary to make or to fix a money-value upon the

interests of a reversioner of a Hindu widow. The learned Judges of the Calcutta High Court proceeded on the analogical consideration of section 266 of the Code of Civil Procedure under which it has been held that the reversioner's interests cannot be attached in execution of a decree. The cases cited below<sup>2</sup> have been considered by their Lordships as authorities on the point. But the principle underlying these decisions have been disposed of with the remark that there are many things which are scheduled as unattachable under section 266 by execution of a decree, but which nevertheless are saleable by private and voluntary transfers. This analogical reasoning, I am afraid, is hardly satisfactory. There can possibly

1. *Brahmadeo vs. Harjan*, 25 Cal., 778.

2. *Anandibai vs. Rajaram*, 22 Bom., 984. *Khoraj vs. Komul*, 6 W. R. 34. *Ram vs. Dhurmo*, 15 W. R., 17, F. B. Over-ruling 12 W. R., 45.

be no kind of analogy between statutory provision and the voluntary acts of parties. The voluntary alienations of coparcenary interests are not valid in certain Provinces in British India. But since the decision of the Privy Council in *Deendaya's* case it can hardly be contended that the coparcenary interest is not capable of attachment and sale. This, no doubt, is a converse proposition of law. And it would, I fear, be inconsistent to hold that though the reversioner's interest is not capable of seizure and sale in execution of decree, it can nevertheless be the subject of private speculative bargain, and that it is capable of being appraised and valued by an actuary. I am at a loss to understand who, as an actuary, can fix the valuation of a reversioner's interest. All the thumb calculations of an actuary, trying to fix the valuation of a reversioner's right may any moment prove illusory when the reversioner dies during the life-time of the female heir, and the inheritance is diverted to another reversionary line. It would be seen that subsequent authoritative rulings of Courts have dissented from the aforesaid view of the Calcutta High Court. In *Nund Kishore v. Kaneram* I. L. R., 29 Cal., 355, it has been held, following the principle laid down by the Privy Council in *Sham Sundarlal v. Achhan Kunwar*, (1898) L. R. 25 I. A., 183 that the interest of a Hindu reversioner expectant upon the death of a Hindu female cannot be validly mortgaged by the reversioner. The ruling of the Calcutta High Court reported in I. L. R., 25 Cal., p. 778 has been expressly dissented from. The original decision of Mr. Justice Chandavarkar in I. L. R., 30 Bom., p. 304 is no authority to impugn the correctness or the soundness of the later Calcutta decision quoted above. Because, in the first place the Bombay case is one of Mahomedan heirship. It has no analogy with the Hindu reversionary interest. And it can hardly be any authority in the face of the decisions on the subject of Hindu Law of reversionary interests in relation to the estate of Hindu widows referred to above. It will be noticed that in the Calcutta case reported in I. L. R., 25 Cal., 778 the reversioner's alienee brought his action after the death of the widow. This circumstance makes all the difference in the case. If the vendor-reversioner survives the widow, surely the vendee has title to go upon. But what if the reversioner-vendor had predeceased the widow? Could the vendee have any right or title to sue upon to enforce the right created by the vendor in his favour? Such a deed of transfer would be consigned to the ashes with the remains of the vendor-reversioner.

In default of direct male issue, the widow succeeds as the heir to the deceased male owner. But, besides the widow, there are other classes of female heirs,—such as the mother, the daughter, the sister, daughter's daughter, and so forth. But as distinguished from the widow, the other female heirs mentioned above are at times *heirs* and at times they are *reversioners* also. The word “reversioner” has always a relative meaning and application. It invariably implies the existence of an heir, for the time being; and, as it is commonly understood, such heir is always a female with the restricted rights. In the various Schools of Hindu Law in force in this country, apart from the question of the widow's rights in coparcenary or divided estates discussed already, there is no substantial difference in India as regards her limited rights in the sense that her absolute dominion over the inherited estate is controlled by the principles of legal necessities. But with respect to the other females, most of whom have been mentioned above, there are great divergences of thought which prevail in the several Provinces of India, which are regulated by the accepted texts and commentaries of their schools, and interpreted by the rulings that are in force. The texts and their interpretations prescribing the several peculiarities of devolutions to the female heirs will not be treated here. But their applications in cases bearing on principles of legal necessities and obligations will be discussed with the necessary fullness and discrimination. There will be not much to deal with those females who have got absolute dominion over their estates, nor with the estates of such other females who enjoy freedom from the usual restrictions that prevail over the country in consequence of peculiar local customs and traditions. References would be made to these exceptional cases for comparing and distinguishing purposes. It would, however, be noticed that all sorts of local assimilating influences are at work to bring about a sort of general uniformity, which having regard for the original texts of sages prescribing one kind of general Hindu jurisprudence is not at all an undesirable result. It is not often that the conformity with the *lex loci* was deduced from the undoubted evidence of the adoption of the local customs, habits, forms of worship, or the marriages in the families. Yet unknowingly and imperceptibly as it were, the law in force for the neighbours has been applied to the families who have settled in the Province from abroad for a sufficiently long time, and for a large number

The female heirs generally · Legal Necessity.

of generations. The main question of the widow's right, technically so called, was the theme of our consideration before. The rights and liabilities of the other females owing similar estates have also been referred to. But as no detailed consideration of the rights of the other females have been explicitly treated in the foregoing pages we will

now attempt to do so; and for this purpose, we  
 Primary text of inheritance. \* will adopt, in order to keep to a system, the

fundamental text of Yajñavalkya which practically contains the keynote to the whole Hindu Law of Inheritance. One version of the text is,—

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ।

तत्सुता गौतमजा वन्धुः शिष्यः सर्वज्ञचारिणः ॥

That is failing sons &c, the order is, widows, daughters, (including their sons) parents, brothers and their sons, gentiles, cognates, pupils, and fellow students. The list is by no means an exhaustive enumeration, as the text-books on the subject show. After the widow, we take the case of daughters first. Treatises on Hindu Law of Inheritance make various classifications of daughters, namely, maiden daughters, married daughters, widow daughters, daughters with sons, barren daughters, daughters well provided for, and indigent daughters. We will not discuss at all the much-vexed and discrepant controversies in the texts as well as in the commentaries, the respective priorities of succession and exclusion, among these several classes of daughters. By the expression daughter's estate we will always and invariably mean that estate which she acquired from her father, either by grant or by succession. We will of course notice, as regards the estate so acquired, the kind of interest acquired by her in view to find out the application of the doctrine of legal necessity. Confining ourselves strictly within the limits thus defined, we proceed to consider the principles that have been considered as well-settled.

Let us begin with Mayne.<sup>1</sup> After mentioning several classes of women named above, the author lays down,  
 Mayne on Daughter “the daughter and the mother appear to have been the first” (after the widow) “to obtain a recognized right to inherit.” He then needlessly gives a long account of, as he calls

1. See Sixth Edition, para 519.

her, an appointed daughter, to raise a son through her. But as this sort of incestuous concubinage has entirely disappeared since ages past from the face of the land, there is no need to consider her rights over properties for which there is neither any text nor precedent extant in the country. "But," continues the learned author, "when the practice of making an appointed daughter became obsolete, the daughter not so appointed would naturally fall into the same position, or rather would retain the position which usage had made familiar. Her right would then rest on the simple ground of consanguinity. This is the ground on which it is based by *I'rihaspati* and the *Mitakshara*. 'As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?'"<sup>1</sup> The author then goes on enumerating the gist of the views of the several schools of Hindu Law prevalent in the various Provinces of India. These we do not state here in detail. But proceeding with our own subject we will put it generally, that except in Bombay daughter inherits limited interest like the widow. If there be several daughters, and they or some of them have sons, none of the sons has any interest in the estate till all the daughters die. Such being the case, the daughters take the assets of their male ancestor directly from him, and they enjoy them *per capita*, and not *per stirpes*. Repeated rulings of the Bengal Courts, in cases governed by the principles of the *Dayabhaga*, *Mithila* and *Mitakshara* Schools, rulings of the Madras Court, governed by the *Mitakshara* only, have all clearly laid it down that the daughter is not competent to make a permanent and valid transfer of her deceased father's estate without legal necessity for the alienation. It would be

Legal necessities of daughters, mothers, &c. more limited than those of widows.

shown when we come to cases and to the discussion of the principles thereof, that the range of field which the legal necessities of a widow occupy is by far considerably wider than what is in the case of a daughter or a mother. The reason thereof is obvious. In addition to the ordinary secular and moral obligations which come in the way of other female heirs, the widow holds the higher obligations of religious and spiritual benefits which she is bound to render to her deceased husband in every possible way. The other female heirs come in the list of designated heirs under the texts. They *therefore* take.

The widow, while taking precedence, occupies a much higher rank. *In* widow the late male owner, her husband, lives : and tradition has it that there is unity and continuity of spiritual existence of the husband and the wife till the last breath of either of them. No lawyer can say that the oft-repeated phrase, "Widow represents the estate in her possession," has been seriously argued with reference to the daughter, mother or any other kind of female dealing with the property of the late male owner. By tacit consent, as it were, these female heirs are looked upon as tenants and holders of the estates for life. But as the restrictions of legal necessities and obligations are mostly common with all classes of female heirs, it is in that sense and no other that we read it said that all of them enjoy and have the same rights as those of a Hindu widow.

It would appear from an early decision in Bengal<sup>1</sup> that an unmarried daughter succeeding to her father took something like an *absolute* estate, and the property inherited by her went, at her death, to her heirs to the exclusion of her father's. That is, if she married after succession and died leaving male issue, the son excluded her sisters who survived her. This view is hardly reconcileable with the rule laid down by the same High Court in a later ruling,<sup>2</sup> wherein it has been held that both under the Mitakshara and the Dayabhaga, the unmarried daughter succeeds only in priority of her married sisters, and not to the ultimate exclusion of such sister's right of inheritance from the father. Therefore, where a Hindu

Right of survivorship among daughter

under the Mitakshara died leaving two daughters, one married and the other unmarried, and the latter succeeded to the father's estate, and then married, and subsequently died leaving a son and her sister surviving her, it was held by the Calcutta High Court, that the sister was entitled to the property. This has been held to be the rational meaning of the texts of the Dayabhaga or the Mitakshara as to the nature of interest inherited by daughters. One general conclusion, deducible from the law and the authorities is, that a daughter inheriting the property of her father takes a life-interest only in such property. She has, consequently, no power of alienation, except for certain specified purposes, beyond

1 Radhakishen vs. Raja Ram Mundal, 6 W.R., 147

2. Doulat Koer vs. Burmadeo, 14 B. L. R., 246.

her life-time. The heir of the father, on her death, takes the property as heir of the ancestor and not as her own.<sup>1</sup> The daughter's right is only inferior to, in point of precedence, but it is certainly independent of, the widow's right. Both under the Dayabhaga and the Mitakshara the daughter is in no better position than the widow except in the Presidency of Bombay.

What is said above of daughters is applicable equally to the estate inherited by the mother, grand-mother, and the like. There is no questioning now of the universality of the rule that (except in Bombay) whenever *any female* takes as heir to a male, she takes a restricted estate, an estate which, according to orthodox views, she would be bound to pass on to the next heir, not her own, but of the last male owner, in an undiminished state. Sister is nowhere recognized an heir, she is excluded by the Bengal as well as by the Benares authorities, and also in the Punjab. She is admitted in Bombay, and recently in Madras.

Mother, grandmother &c. Same limited right.

Sister excluded everywhere, except in Bombay and Madras.

The Bombay courts have, by a process of induction as it were from the case-law, adopted a peculiar classification of the female heirs with regard to the nature of the estate acquired by each. "Those who by marriage have entered into the *gotra* of the male whom they succeed, take an estate similar to that of a widow. Those who are of a different *gotra*, or who upon their marriage will become of a different *gotra* from the last male owner, take absolutely. Under the former head fall a widow, mother, grand-mother, &c; and under the latter head are ranked a daughter, sister, niece, grand-niece, and the like."

With the exception, then, of the view prevailing in Bombay, we have it, that all the females inheriting from a male derive an estate similar to that of the widow. They occupy, however, a position in the list of heirs in the order prescribed in the text, that is, the widow comes first, then the daughter, the mother &c., &c. During the widow's

Bombay classification of female heirs

Daughter a reversioner.

1. *Deopershad vs. Lujoo Roy*, 14 B. L. R., 245; 20 W. R., 102; 22 W. R., 54, 496. *Sivagunga Zemindary Case*, 4 Indian Jurist, N. S., iii; *Muttayan Chette vs. Sangiliviya Pandia*, 4 Indian Jurist, 444.

2. *Tuljaram vs. Mothura Das*, 5 Bom , 662, 670.

life-time, the daughter occupies the position of the next reversioner. It follows, therefore, that while she can question the dealings of the widow in the same way as any other reversioner, she has absolutely no hand or control on her father's estate during the widow's life-time. A daughter, for instance, has no right to recover a debt due by her father's debtor when the widow, her mother, is alive. She is also not entitled to have her right to the debt declared, nor is she entitled to set up collusion between the widow and the debtor as any justification for her action. Indeed, it is hardly a case of improper alienation to authorize the daughter to assert her claim when her mother is alive.<sup>1</sup>

Complications arise when a man dies leaving several classes of female heirs and female reversioners,—widow, daughters, mother, and the like.

If the widow makes an alienation without legal necessity, and dies leaving daughters and their sons, and some of the latter take possession of the estate, the heirs-expectant in possession of the estate, even if more distant in consequence of the intervention of some living daughters, may question the alienation. In a Madras case,<sup>2</sup> the alienee derived his title by execution of a decree against the widow for a debt unconnected with legal necessity. Though the alienee happened to be the widow's predeceased daughter's husband, whose own sons were in possession of the estate while the surviving daughter, the immediate reversioner, was living. The alienee afterwards mortgaged his rights, and the mortgagee sued. The claim of the mortgagee was successfully resisted by the daughter's sons, though the surviving daughter was not made a party. It was, however, held in that case that her rights were not prejudiced or affected by the proceedings. If, on the other hand, the debt be founded on legal necessity and is enforced against the widow as representing the estate, the alienation brought about makes the estate pass absolutely as against all future heirs and reversioners.<sup>3</sup>

We quote below two important rulings of the Privy Council which have laid down the leading principles on the several rights of the

1 Lukhee Narain vs. Sreenath, 24 W. R., 226

2 Karuppa vs. Alagu, 4 Mad., 152.

3 Hari vs. Minakshi, 5 Mad., 5; following *The General Manager of the Raj Durbhanga vs. Maharaja Coomar*, 14 M. I. A., 605



female heirs to the property of a deceased male, some of whom have vested and others barely contingent reversionary interests. In the first

The leading P. C. case, *Isri Dut Koer v. Hunsbutti*, I. L. R., 10 Cal., 324, P. C., the Lords of the Privy Council decisions on remoter re- have held that if a daughter obtains a transfer of versioners.

the estate from her deceased father's widow, she does not acquire thereby an estate valid against the title of her father's collateral heirs expectant on the death of the widow. The next decision of the Privy Council is the case of *Rani Anund Koer v. The Court of Wards*, L. R., 8 I. A., 14, which has laid down the rule of law that a suit by the

remoter reversioners is not maintainable in the Collusion &c neces- absence of proof of collusion or connivance sary.

between the widow and her daughter. The divergent currents of rulings that have been based on these two leading Privy Council judgments are deserving of careful study, and some of them are noticed below.

In an Allahabad case<sup>1</sup> decided on 4th June, 1884, Straight and Brodhurst, JJ. held that the intervention of Remoter reversioner daughters precluded the more distant male rever- sioner from suing the widow to challenge an alienation of property on the ground of there being no valid legal necessity. But in a subsequent ruling of the same High Court,<sup>2</sup> another bench composed of Oldfield and Mahmood, JJ. held on 10th June 1884, that if only a daughter intervenes between the reversioner and the widow in a suit in respect of an improper alienation, the Court will not be justified in presuming her (daughter's) acquiescence or consent from the mere fact of her delay in questioning the transaction. This observation was made by the learned Judges in answer to the contention that the daughter was chargeable with tacit collusion on account of her long and culpable silence after the alienation had taken place.

In the second case of the Allahabad High Court, a new principle was for the first time introduced by the learned Judges. It was to this effect;—that if the Remoter reversioner presumptive reversioner was a daughter, a mother, to the full ownership or, Full Ownership theory. or so forth, that is, a female heir whose right

<sup>1</sup> *Madari vs. Malki*, 6 All., 428.

<sup>2</sup> *Balgovind vs. Ram Kumar*, 6 All., 431.

of succession and the interest in the estate could not surpass the "widow's estate," an allegation of collusion or connivance was not necessary to justify the action by the remoter reversioner, if the next presumptive reversioner claiming was an heir to the *full ownership* of the estate. It was noticed that this principle was a departure from the hard-and-fast rule laid down in the preceding judgment by another Division Bench of the same High Court, but the view was attempted to be justified by the fact that the Privy Council decision, relied on in I. L. R., 6 All., 428, was distinguishable, in-as-much as the intervening reversioner, in that case, was an heir who was entitled to the *full ownership* as against the limited rights of a female heir. The principle introduced a new and a strange theory. The learned Judges did not fail to notice, that the theory propounded, though consistent with the notions of female's rights over inherited property throughout the whole of India, was repugnant to the recognised Bombay view of certain classes of female's rights, namely those of the *a-sagotra* or *bhinnu gotra Sapinda* females, daughters, sisters, maternal aunts, or the like. Mahmood, J. observed:—"It appears to me that, under the Hindu law, when a full owner dies leaving a mother, a daughter, a widow or widows, the estate which devolves upon them is of one and the same character; and their succession to the estate after the death of one another must be understood to be a prolongation of the widow's estate,—a prolongation which cannot, for the purposes of the present question, be regarded as affecting the position of the nearest male reversioner to the *full ownership* of the estate." Certain old decisions<sup>1</sup> of the Sudder Dewani Adalat have been quoted in support of this view.

The doctrine of *full ownership*, which tends in a way, to derogate from the vested rights of the immediate reversioner with limited rights was further developed by another Bench<sup>2</sup> of the Allahabad High Court, where with Mahmood J., curiously enough, Straight J. sat and concurred after having been himself a party in the decision

Further development of the full ownership theory.

A distant reversioner.

1. Chunder Coomar vs. Dwarkanath, S. D. A., L. P. 1859 ii, 1623. Balgovind vs. Hirurance, 2 W. R., 255, Ramlal vs. Bunseedhur. S. D. A., N. W. P. 1866, p. 67.

2. Sant Kumar vs. Deo Saran, 8 All., 365.

reported in I. L. R., 6 All., 428. The learned Judges laid down the following principles :—

(1) That a more distant male reversioner (a daughter's son) is not debarred from bringing an action, during the life-time of his mother or maternal aunt, to question an alienation, without legal necessity, of the estate, to the *full ownership* of which, he has a reversionary (though distant) right.

(2) That though technically a more distant reversioner, with a chance expectant of *full ownership*, the male heir is not, on one hand, bound by a decision of the nature of a compromise or a decree passed by withdrawal of the suit between the widow and some of the intervening life-tenants. On the contrary, he can, by fairly conducting his litigation and contest in Court, bind the actual near reversioner, whoever he or she may be who would survive the widow, by the result of the decision arrived at in his own case. This has been considered to be the plain deduction from the authorities<sup>1</sup> that exist, the only criterion being that the suit was *bona fide* and fairly contested, and a well considered decision passed. A Madras decision<sup>2</sup> has followed this view. The full ownership theory received a check in later decisions of the Allahabad High Court which considered that the rational deduction from the ruling of the Privy Council, some earlier rulings of the same Court, including a Full Bench decision, was to hold<sup>3</sup> that the only person, male or female, prospective owner of full or of limited rights, who, as distant reversioner can maintain an action to question the alienation by a widow, can do so by pleading and showing that the nearer reversioner had refused to take action, or that he or she precluded himself or herself by previous conduct from suing, or that there was apparent collusion. Another Bench of the same High Court in *Isvear v. Janke*, I. L. R., 15 All., 132, has in a way

1. *Rani Anund vs. The Court of Wards*, 6 Cal., 764, L. R., 8. I. A. 14; *Nund Koer vs. Radha Komari*, 1 All., 282. *Katama Natchiar's case*, 9 M. I. A., 543. *Mt. Bani vs. Mt. Sita* 9 C. P. L. R., 59.

2. *Raghupati vs. Tiru*, 15 Mad., 422.

3. *Jhula vs. Kanta*, 9 All., 441. *Rani Anund vs. The Court of Wards*, L. R., 8 I. A., 14. *Raghunath vs. Thakuri*, 4 All., 16. *Ramphal vs. Tulā*, 6 All., 116. *F. B. Madan vs. Puran*, 6 All., 288.

discarded the theory of full ownership, following *Madari v. Malki* I. L. R., 6 All., 428, and dissenting from *Balgovind v. Ram Kumar* I. L. R. 6, All., 431.

There is a decision<sup>1</sup> of the Madras High Court which has affirmed the view that the intervention of two  
 Madras view. life estates is no bar to a declaratory action by a remoter agnate reversioner under Sec. 42 of the Specific Relief Act. The same High Court, however, in an earlier ruling<sup>2</sup> pointed out the general rule to be, "no doubt, that the right to bring a declaratory suit before the reversion vests in possession is limited and belongs to the presumptive reversionary heir; but it must also be observed that a remote or contingent reversioner may be permitted to sue under special circumstances." This, the Court said, was the logical deduction from the Privy Council decision already noticed.

The fine distinction drawn between the intervening life estate and *full ownership* discussed in various ways with different results in the High Court of Allahabad has not been much thought of in the Bombay Presidency where the rights of other females after the widow are looked upon in a quite different light. *Ramabai v. Rangrav*, I. L. R., 19 Bom., 614 is a case of adoption. There, a remoter reversioner sued. The intervening daughter was practically ignored. She was not even impleaded in the action, though in the event of the adoption failing, she was the nearer reversioner, or rather the full owner according to the Bombay theory. The case was allowed to proceed,—the High Court not interfering with the discretion of the Courts below in the matter; because obviously, the property involved in the litigation was *watan* estate, regulated by special Bombay law—(See Act V of 1866—Section 2); the nearest male *agnate* had a preferential claim to that of the daughter or any other female heir after the widow. With reference to the particular point under consideration, the Court intimated its close adherence to the *dicta* of the Privy Council,<sup>3</sup> and added that the Courts below would have exercised a better discretion if the daughter had been impleaded and the necessary averments of her

1. *Kandasami vs. Akkamal*, 13 Mad., 195.

2. *Mahomed vs. Krishnan*, 11 Mad., 106.

3. *Rani Anund Koer's case*—L. R., 8 I. A., 14 (22). *Koer Golabsing's case*—14 M. I. A., 193.

into full ownership. But the reversioner's rights are neither attachable nor alienable amicably. A widow is at liberty to sell off her rights privately : and in so far, she is not hampered by the rules of legal necessity. The purchaser gets all the rights by such sale, as well as by execution sale. But it is a very debatable question whether she can vacate the inheritance in favour of her reversioner, or, the latter can buy her life-estate in such a manner as to effect a complete and inseparable amalgamation of the two kinds of estates into one full and complete ownership. The equity of redemption of the mortgagor is his exclusive estate, heritable and assignable in every way. It is real ownership over the property less a quantity of ownership transferred by him by mortgage. There is no third man with any kind of claim or interest in the estate. But the reversionary interest is very precarious in its nature. It is a bare windfall. While on one hand, it extends over a line of prospective heirs of whom there is no limit : on the other hand, it depends solely on the accident of the widow's death natural or civil. The heir, then living, to the late owner is the real reversioner, and he is then invested at once with the rights of full ownership, if male, and with the limited estate, again, if female.

Whatever that be, Legislature have prescribed law to protect the reversionary estate from danger. There may be discrepancies of views in Courts on the mutual rights and liabilities among the reversioners, *inter se*, remote and near. They may join hands or fight to the bitterest end to settle their respective claims when the proper time arrives. But before that, if the reversionary interest is threatened with a common danger and if in the midst of conflicts of views as regards the remoter reversioner's right

Discretionary jurisdiction. to sue, or in respect of any other point of law regarding which there may have been

or may be any reasonable difference of opinion, the Court exercises its discretion in some way,—say it passes the usual declaratory decree in favour of a remoter reversioner :—if, for instance, the Court has found that an alienation is flagrantly unjust and seriously repugnant to legal necessity, and the remoter reversioner has sued with the slight defect in the framing of the suit (the necessary averment in the plaint and the necessary parties

being omitted), and the declaratory relief has been granted—will the discretion be interfered with, and the decree reversed in appeal? We know it that the relief obtained is no personal benefit to the plaintiff. It is a judgment *in rem* for the benefit of the entire line of reversioners, near as well as remote. The Court being seized with the matter, and having undoubtedly jurisdiction to try the suit, and having fully entered into the merits of the case, passes the decree; such a decree cannot be reversed in appeal simply because the discretion has been exercised on technically improper grounds.<sup>1</sup> Bare technicality of such sort means no more than error, defect or irregularity covered by section 578 of the Code of Civil Procedure; that is, so long as the merits of the case or the jurisdiction of the Court are not affected. Similarly, if the point of legal necessity so intimately concerns the nearer or the presumptive reversioner or reversioners, that his or their names

in the array of parties are vitally material with the requisite pleadings; or, if in

Discretion not arbitrary      a plain case of alleged want or existence of legal necessity, the Court considers after full appreciation of facts, that the remoter reversioner might as well have not sued and the declaratory relief is, on that ground, refused, the Court of appeal will feel inclined not to interfere. But, if the case is clear, and the presumptive or distant reversioner sues and proves his allegations entirely, refusal to exercise jurisdiction would be subversive of sound and equitable judicial principles. In the same way, if the legal necessity is completely and fully made out, and yet the usual declaratory relief is granted, the decision is the plain abuse of the Court's discretion and it deserves to be rectified by the Court of appeal. Similarly, if unopposed the remoter reversioner on one hand, and the female heir and her alienee on the other, have carried their contentions to the last stage, and the matter is clear and ripe for decision, it would be hardly consistent with judicial principles to allow bare technicalities to predominate over the merits, and to refuse to decide because it is discretionary with the Court to do so. We have cited several cases already to show why the declaratory relief has been refused. Those decisions as

1. *Sant Kumar v. Deo*, 8 All., 365.

Sec. 22, Act I of 1877. well as the leading Privy Council judgments<sup>1</sup> on the subject afford the reasons for the enactment of Sec. 22 of the Specific Relief Act with all its many clauses of complex reading.

An ordinary case in India of representing complete inheritance is the case of a man dying leaving a widow and a daughter. The daughter may be with a son or sons or without any male issue.

It is in a case like this, particularly when there is a son of the daughter, that is the cognatic grandson, capable, directly after the lineal male descendant, to offer the funeral oblations to the deceased and to his two ancestors above, and entitled to the prospective full ownership by his own right, that the notion of full representative ownership arises. It is therein, that the mistake, analogically speaking, of the conception of merger of the mortgagor's and of the mortgagee's interests into full ownership, happens, not without reason. It is barely a technical quibble, though all the same it is theoretically correct, that the widow, her daughter, and her son do not represent the full ownership. The deceased's agnates, more or less distant, always cast a jealous eye. Because they know it to be the sound Hindu Law that if within the lifetime of the widow, the cognatic nearer *sapindas* disappear, there would be none in the field to dispute their right. We do not for a moment contend that if the widow conspires with her daughter, with or without the latter's son, to defeat the prospective contingent right of the agnates, they run the risk of the legal challenge of the principles of legal necessities. A large number of cases that have occurred is of this description: while a still larger number of cases of legal necessities owe their origin to the jealousies, open quarrels, and the usual dissensions that exist in Indian families between the widow of a separate and divided male member of the family. In Bengal, the said tension of feelings is stronger; because there the coparcener's widow gets his share. We will now take instances of the ordinary cases of the widow and her daughter, generally with the best of feelings between themselves, and consider how far, as the cases go, the law of legal necessities has asserted its sway.

1. Sadut Ali v. Khajih Abdul, 11 B. L. R., 203 Sheo Singh v. Dhako, 1 All, 688.

In *Gopichand v. Sujankuar*, I. L. R. 8 All., p. 646, the parties were *Sadhus*. The last male owner died leaving a mother, a widow, a daughter, and daughter's sons. The widow and mother quarrelled and by arbitration, they divided the self-acquired property of the late owner. The mother alienated her share, without legal necessity, by gift, in favour of her nephews. While the widow, the real life-holder was living, the daughter and her sons sued to annul the alienation. The court decided,—

(1) That *Sadhus* are governed by ordinary Hindu Law, any other custom to the contrary not being shown.

(2) That the plaintiffs, though remoter reversioners, were entitled to sue, as the mother's alienation was based on an alienation by the widow, and was, in one sense, the widow's alienation.

(3) That the arbitration decision was but an amicable division of the widow's life-estate, and an absolute estate was not created thereby.

It need hardly be stated that the daughter herself, and in default of her, the mother, &c. are, while the widow is alive, the reversioners. To avoid alienation without legal necessity, the daughter or the mother may bring a declaratory action, and her own limited estate will not stand in the way.

If the widow, who certainly succeeds in preference to the daughter, claims exclusive estate under a will of her husband, and alienates property for ever in that belief, the daughter has every right to impugn the alienation on the ground of want of legal necessity, and at the same time challenge the claim to the absolute estate.<sup>1</sup> The will in this case was to the following

Estate willed to widow and her alienation thereof.

effect: "To my wife . . . who is my next heir, I with my free will, give and deliver the following property on these conditions that

I shall have entire control over them during my life-time, and that, after my death, my wife, taking possession of them, shall perform, with their proceeds my obsequial rites, defray marriage

1. *Kallian Koer, &c., vs. Tulapal Singh, &c.*, 11 C. L. R., 204.



expenses of daughters and other legitimate expenses of the household . . . . That my wife shall take possession of my real and personal estate." The High Court held, on the principle of *intention* evidenced by the instrument, that there was no provision in the will conferring upon the wife the right of alienation, and that no more than widow's estate was created ; the daughter

Legal necessity not proved by general allegations, was entitled to the declaratory relief. The alienation was intended to be supported

on the ground of legal necessity by general allegations of debts ; but the existence of the debts was not proved by documentary evidence of bonds and other reliable means ; the plea of expenses for the marriages of daughters was met by the fact that the husband died possessed of property yielding substantial income. The daughter claimed possession of the estate alienated and also for declaration. The former, of course, was refused under principles which are settled<sup>1</sup> ; but she obtained the usual declaratory relief. It has been shown that the general rule of interpretation that the intention of the grant by will or gift has to

Will to Hindu widow, restricted power generally, be gathered in each case from the surrounding circumstances. Thus, an heirless husband declares that his wife after him shall be the

owner of the estate, an absolute right in favour of the widow is deducible.<sup>2</sup> The case was noticed in a subsequent ruling<sup>3</sup> of the same High Court with approval. But there can be no doubt that the general tendency of the case-law on the subject is otherwise ; that is, to restrict the power of the widow to alienations with the sanction of legal necessity. By the use of such expression as " my wife is the owner after me " or " my wife is the heir " it is usually understood that the provision is made for the succession of the widow and no alteration of the line of inheritance is intended. Expressions like the above are deemed ambiguous. It is true that the language of Sec. 82 of the Indian Succession Act, and Sec. 8 of the Transfer of Property Act, the former embodied in the Hindu Wills Act of 1870, would seem to imply that a gift, bequest, or the like, would convey, in all cases, an absolute interest unless the

1. *Rajessuri vs. Maharanee Judarjeet*, 6 W. R., 1.

2. *Janki vs. Bhaiyan*, 19 All., 133.

3. *Surajmani vs. Rabinath*, 25 All., 351.

contrary\* is expressed or implied. This would have an important bearing on the question of *onus*. But it must be held that the case law on the subject and the tenets of substantive Hindu law would lend a different interpretation, and a will to a wife, unless differently expressed, would always mean to convey the ordinary widow's right. *Bhobatarini v. Pearylal*, I. L. R., 24 Cal., 646 ; *Harilal v. Bai Rewa*, I. L. R., 21 Bom., 376.

In a case of will or gift in favour of the daughter, sister, or the like, the grant contemplates, in its inception, an absolute estate. This has been already noticed, with the rulings of Courts. Will to daughter, &c., otherwise  
In an ordinary case,<sup>1</sup> the Courts construe the grant in strict conformity with the prevailing Hindu notion on the subject. An alienation by the grantee unsupported by legal necessity cannot be upheld.

At the commencement of the British rule in India when the Civil Courts were established in the country to decide questions of Hindu Law. when the learned *pundits* of Bengal versed in the literature of the *Shastras* used to prescribe their *vyavasthas* or the principles of Hindu Law for the guidance of the Courts: when the experienced and learned English Judges used to adorn the benches of the Sudder Dewany Adalat and the Supreme Court of Bengal over half a century ago: when the oriental jurists of the eminence of Sir William Jones, Colebrooke, Sutherland, Macnaghtens, sitting by the side of the erudite *pundits* were learning the *Shastric* texts and commentaries from their original sources: when the aforesaid jurists propounded the doctrines of Hindu Law in their respective treatises and translations which have come down even at the present moment as valuable and almost infallible enunciations of our ancient Hindu *Smritis*: when the learned English Judges were critically and analytically studying the comparative legal status of the English life-estate and the estate in remainder with reference to the Hindu widow's estate and the vested and contingent interests of the reversionary classes (agnatic and cognatic): when for the first time, and perhaps for ever, were coined

1. *Musstt. Kollany vs. Lachman*, 24 W. R., 395.

the memorable expressions and names such as "widow's estate" and "reversioners" to represent the present vested interest of the female heir, and the contingent interest of the heir after her :—in those days certain rulings were passed, not without doubts and prevarications, which seemed to indicate as if the Judges regarded the female heirs in the light of trustees during the period, as it were, of suspended inheritance between the late male owner of the estate and the next male taker thereof. In that view of the matter we find cases decided from about 1840 to 1860 in which, in actions by reversioners impeaching transfers by female heirs in possession, if the alienees did not make out the *bona fides* of the transactions or prove justifying grounds for the alienations, the heiresses in possession were ousted of the estates, and the alienees deprived of all benefits of the transfers effected in their favour. Sometimes receivers were appointed to take charge of the inheritances, keeping accounts and supplying the females with their needs ; and at times the reversioners suing were nominated as the receivers and managers of the estates. But in those cases, most of which have been noted in the preceding pages, there were extraordinary circumstances in the transaction which needed extraordinary or drastic remedies. In those cases the alienations, as a rule, were of extravagant, reckless, and wasteful descriptions. They were instances of gross mismanagement, somewhat of the nature of fraud on the inheritance of vested and contingent interests—acts of spoliations rather than ordinary cases of transfers of the property. The circumstances of the cases, generally speaking, were such as to indicate as if recklessly and foolishly the female heirs were bent on vacating the inheritances in favour of designing alienees in such a way as to endanger the interests of the next owners of the estates concerned.

The above undoubtedly are instances of extreme cases. But in those cases it would appear, there was an under-  
Equitable view on  
the above.
current of thought to indicate that there was not much of ownership in the estate belonging to the Hindu widow with respect to properties, moveable and immoveable, that descended to her from her late husband. Gradually it was found that there was a gross error in this early view of the matter. It was recognised that by the correct interpretation of the texts the ownership of the female heir was rather substantial than

shadowy, and that under justifying causes she was entitled to part with the property in her hand. In course of time this idea grew up to a very big proportion and it was begun to be considered that the widow's disposing power of properties was co-extensive with her life. We find the evidences of the legislative recognitions of the above development of views in the body of the laws that were passed in 1877,—I mean Sec. 42 of Act I of 1877 and the Illustrations appended thereto, and Arts. 125, 140, 141 of the Limitation Schedule. The first indication of an authoritative judicial expression of the aforesaid view would be found in a Full Bench case<sup>1</sup> in the year 1862. The case was ably argued before the learned Judges of the High Court of Calcutta when many of the earlier rulings referred to in a foregoing paragraph were reviewed by the learned Judges at considerable lengths. Among others the learned Judges referred to a ruling of the Privy Council passed in the year 1826, and it was held on the basis of the correct views expressed in the Privy Council case and other leading cases cited, that it was incorrect to hold that the widow's estate was a void or a blank, that she had proprietary interest (restricted it may be) and a right of ownership which was capable of being conveyed by her to another. But at the same time, said the learned Judges in the Full Bench case just cited, the reversioner was not without his remedy, in case of an improper alienation by her, both before and after the death of the widow. But what in each case the remedy would be, has been stated in general terms in the decision. I am going to enter into a detailed consideration of the point in the succeeding paragraphs.

We are familiar in modern times with the two peculiar and stereotyped kinds of reversioner's suits on this and on the other side of the widow's grave. In her life-time the familiar mode of action is one for declaration, that the alienation is not binding on the next reversioner at the time of her civil or natural death. This familiar or the common mode of action is founded on the crystallized view of law embodied in the aforesaid enactments of the Indian Legislature. But by appending bare Illustrations under the main

Remedy in cases of  
wasteful alienations.

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1. Govind Monce vs. Sham Lall, W. R. (Sp. N.o), 165

law prescribed in Sec. 42 of the Specific Relief Act, the Legislature did not mean to exhaust the resources and scope for all possible contingencies of cases. Illustrations under the various sections of law are by no means exhaustive enumerations of all kinds of cases. We find it repeatedly laid down that some Illustrations are misleading, and that far from illustrating they lead to confusions and intricacies that are destructive of the main provisions of the law. I am going presently to show that unhappily this mischief has occurred in a large number of cases relating to the properties of female heirs and arising out of their improper transfers for the sole reason that the Legislature have considerably narrowed down the scope of reversioner's suits by carefully drafting inapt words and expressions in the Illustrations under Sec. 42 of Act I of 1877 and the Arts. of the Limitation Act referred to above. This I proceed to do by quoting the words of the learned Judges in the aforesaid Full Bench Case of Calcutta. In the Full Bench Case just cited the following passage occurs (W. R., Sp., at p. 167):—"It has been urged that the reversionary heirs may be prejudiced, if they cannot sue for the property during the widow's life ; for after her death it may be difficult to procure the necessary evidence to show that the conveyance was executed for causes not allowable ; and that in the case of moveable property, such as money or valuable securities, irreparable injury may be done to the reversionary heirs by the grantees making away with the property during the widow's life, or in the case of immoveable property, by committing waste. But our decision will not preclude the reversionary heirs, even during the life-time of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is, therefore, not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient cause to justify the interference of the Court."

The above quotation from the Full Bench ruling of Calcutta, passed in 1864, is a clear indication of the remedy which is available to the reversioners in extraordinary or emergent cases, whether

Declaratory suit not maintainable, when ?

they be voluntary alienations by the life-holder or cases of dispossession brought about against her will. In such cases, it is apprehended, bare declaratory action will not lie by reason of the prohibition contained in the proviso to S. 42 of Act I of 1877. It is, of course, obvious that ordinarily speaking the defendant opposing the reversioner's action and contesting his right to sue may not indicate the possible relief for possession as an available remedy to defeat the reversioner's suit on the technical ground set forth in the proviso. Because, it can hardly be expected that an alienee from the widow or an adverse withholder from her would advance the technical suggestion, even as a demurrer, that the plaintiff-reversioner 'being able to seek further relief than a mere declaration of title' (e.g., by way of injunction, possession, appointment of receiver, or the like) has omitted to do so. The attention and energies of a contending defendant of this class are engrossed in the single thought of contending that the plaintiff has no right to come to Court at all. He forgets for the time being that a demurrer to the action of the above description is quite available to him to defeat the suit on the technical ground laid down in the proviso to S. 42 of Act I of 1877. But at the same time it must be clearly remembered that it is the plaintiff who has to formulate his plaint with necessary averments for consequential reliefs in a proper case of wasteful alienation or supine negligence on the part of the female life-holder. I would here point out that as early as in the year 1883<sup>1</sup> in a judgment delivered by Straight and Tyrrell, JJ. the learned Judges have laid down in the clearest possible language the following rule of law :—“ *Had the plaintiffs merely sought for a declaration of their right as reversioners, they would have been met, and successively we think, with the objection that as they might have asked for consequential relief—namely, that the estate should be reduced into possession—a declaratory decree could not be given them.*” The above quotation has been emphasised ; because, it furnishes the key-note to my argument that the Illustration (e) under S. 42 of Act I of 1877 and Art. 125 of the Limitation Act are misleading guides to the reversioners' actions in a large number of cases. It would be seen in the aforesaid ruling of the Allahabad

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1. *Adi Deo vs. Dukharan*, 5 All., 532

High Court that it is entirely in the plaintiff's hand to set forth exhaustively all his available remedies. Even if the reversioner is entitled to bare declaratory relief he would incur no risk nor violate any recognised principle of pleadings if, in addition to the declaration he seeks for, he claims substantive reliefs for safeguarding his interests in future. This has been done in the case under consideration as well as in two earlier cases<sup>1</sup> of the Calcutta High Court cited in the judgment. These two Calcutta cases, together with numerous other cases, referred to in this chapter, were decisions prior to the passing of the Specific Relief and Limitation Acts of 1877. In subsequent rulings<sup>2</sup> the principle enunciated in *I. L. R.*, 5 All., 532 has been approved and followed. It must here be stated that the Allahabad High Court is in error in considering that the reversioner's possessory relief would be barred by the trespasser's adverse withholding against the life-holder after the lapse of the statutory period. That this is not the correct view of the limitation law, has been amply shown in the preceding pages : because, it is now a settled view throughout India,—a view in accordance with the cases decided by their lordships of the Privy Council—that the actual reversioner at the time of the female's death has the full period of twelve years to sue to recover possession from the wrongful alienee as well as from the adverse withholder of the estate from the late female heir. In so far, therefore, that the equitable view of the learned Judges in the Allahabad case was shaped in consideration of the aforesaid erroneous view of the limitation law, we may not be able to follow the reasoning. But there can be no gainsaying the fact that the chance of limitation bar is not the real ground for granting to the reversioner the substantive reliefs he sought.

If we take the numerous cases of the reversioner's suits which have been and could undoubtedly be instituted after the death of the female heirs, we find clear indications in the latest decision of their lordships of the Privy Council, passed in the year 1908,<sup>3</sup>

Further difficulties  
for not asking special  
remedies.

1. *Radha vs. Ram*, 3 B. L. R., 362 ; *Gunesh vs. Lall Muttee*, 17 W. R., 11
2. *Sarith vs. Budhua*, 8 All., 429 ; *Ram vs. Kedar*, 14 All., 156.
3. *Bhagwat vs. Debi*, 35 Cal., 420.

of the fact that the reversioner is entitled to claim restitution of the estate with all the benefits derived therefrom by an alienee, subject to an equitable refund measured out by the extent of legal necessity proved in the case. It is very significant that the highest tribunal in the land has laid it down as a sound principle of law to be observed in such cases that an alienee from a female heir, or a trespassing encroacher on her rights has got a very serious onus cast upon him to discharge the obligation that he has dealt fairly with the estate of a female heir. It is very noteworthy that in the case just cited the lords of the Privy Council reviewed

Question of Legal  
Necessity reviewed by  
P. C. in second appeal.

as a question of fact, the findings of the Calcutta High Court on the question of legal necessity on the basis of the admitted facts of the case. It is highly problematical that if the reversioner in the Privy Council case had not waited so long as the death of the old grand-mother of the late male owner, in the year 1894, but that he or his predecessor in title had brought the action immediately after the improper alienations in question, could it be said that in defiance of the provisions of the second paragraph of S. 42 of Act I of 1877 and ignoring the reliefs which he eventually succeeded to obtain from the highest Court of India he could file a bare declaratory action? This Privy Council case is an authority for another very important proposition. The case was of voluntary alienations by the several widows after the death of the last male owner. It is, therefore, no longer necessary to consider that there should be the special features of trespass or of fraudulent collusion in the transaction of dispossession to justify the reversioner to ask for substantial remedy in a suit during the life-time of the female heir. In every case of reversioner's claim, filed before the female's death, the contentions necessarily are either that the alienation was justified on the grounds of legal necessity or that the female was not entitled to the estate. If either of these contentions fail, should the reversioner be content with a bald declaration that the property would be available to the reversion after the female's death? Nay, further, will the Court grant such declaration in repugnance to the distinct provision of law in the proviso to S. 42 of Act I of 1877? Under what principles of law, justice or equity will a trespasser be allowed for a single moment to remain in wrongful



possession of the estate after it has been shown that the property was a part of the female's inheritance? Again in cases of voluntary alienations we have the authority of the Privy Council to say that the reversioner is always, *i.e.*, both before and after the female's death, in a position to claim that the estate be reduced into possession. It is perfectly conceivable that in a majority of cases of this description the female heir would seek to join hands with the claimant-reversioner and step in to change side as the claimant herself. This was the case in *I. L. R.*, 5 All. 532. At the present moment I have a case pending before the subordinate Judge of this district (Khandwa, C. P.) in which the female heir, a daughter, having already played in the hands of a fraudulent and designing person and having sold to him a valuable land and a house for an inadequate price, is now repentent for the matter. She is a married woman and is now under the advice and guidance of her husband. By him she has two minor sons who through their father as the next friend have instituted a civil suit to impeach the transaction of sale and to have the estate reduced into possession. Necessarily the plaintiffs have impleaded their own mother as a co-defendant with the alienee and it is clear that she is too eager to be arrayed as a co-plaintiff and to be vested with the proprietary interest which she had lost. A curious episode connected with this case deserves serious attention. At one of the hearings of the case the husband as well as the wife collusively made up their differences with the alienee and presented a *razinama* to the Court praying for the dismissal of the suit, each party bearing their own costs. I did not mean non-plussed by this collusive arrangement and opposed the sanction of the Court as being an illegal and inequitable arrangement under the well-known provision in the Civil Procedure Code. My interference, at this stage of the case, was opposed by the contending counsel apparently with the approval of the Court itself. A long argument followed in which it was pointed out that in spite of the compromise I had a voice in the matter.<sup>1</sup> My contention prevailed, the compromise was set aside, and the case is now proceeding on its merits.

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1. *Govindasami vs. Alagirisami*, 29 Mad., 104 (at 106).

## CHAPTER VI.

### Females generally :—Collusion and consent of Reversioners.

It will appear from a decision<sup>1</sup> of the Allahabad High Court, that as regards the reversioner's right to question the alienation by a female heir without legal necessity, there is no practical distinction between her voluntary alienation and her action in collusion with the other kinsmen, by her acquiescence in and consent to their wrongful possession, or by her intentional abstinence from assertion of rights against such dispossession. The High Court considered that by so acting, she allowed the limitation to begin to run not only against herself but against the whole line of reversioners giving to the reversioner, though remote, an immediate cause of action for a declaration of his right to the estate in the hand of the adverse holder. In the above case, the High Court went farther and held, that the adverse withholding gave to the reversioner a right to sue to have the estate reduced into possession. It is probably not usual to get such sort of relief from Courts of law, except under pressing circumstances. But the Court, in the case under consideration, did grant the relief to the plaintiff with the usual declaration by adding a clause, that the daughter, the next heiress should have possession of the estate, and that if she declined to accept the possession, the plaintiff would have the said possession for her and as her manager, to act under the orders of the Court during the life-time of the daughter, filing accounts, &c. In a later decision<sup>2</sup> the same High Court has assented to the view that immediate possession can be recovered from the colluding and adverse withholder, if by proper pleadings and evidence, a fit case for such a relief can be made out. The learned Judges in both these Allahabad cases have treated on the same footing a wrongful and adverse withholding of an estate from the female heir, and a collusive and fraudulent decree against her if she were a party to the fraud ; and

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1. *Adideo vs. Dukharan*, 5 All., 332.

2. *Sachit vs. Budhua*, 8 All., 429

they have proceeded on the assumption, noticed above, that the reversioner's remedy would eventually be barred by the lapse of time against the female heir. This view of the limitation question is wrong, as settled most authoritatively by recent decisions. The Full Bench decision of Allahabad, *Ramkali v. Kedarnath*, I. L. R. 14 All., 156, has, in conformity with the prevailing views of the other High Courts, laid it down that there is no adverseness nor any dread of the limitation against the reversioner during the life-time of the female heir forcibly or wrongfully kept out, or collusively suffering to be kept out, of the estate. It would seem, therefore, that the argument in favour of possessory relief loses much of its force in such cases. But the other principle seems to be pretty fairly established by the rulings noticed above: and that is, the reversioner is quite justified to seek the usual declaratory relief on the analogy of voluntary alienation without legal necessity. It is only in extreme cases, where the interests of the reversioners, as a class, are in imminent danger, that the Courts of law and of equity may be asked to intervene to protect the estate for the reversion. "They have a right, although they may never succeed to the estate, to prevent the widow committing waste."<sup>1</sup> There is no question or doubt so far. We proceed to consider the principles of law that will govern pure declaratory actions against all classes of adverse with-holding of the estate from the possession of the female heir.

Section 42 of the Specific Relief Act is wide enough to allow the reversioner to seek the declaration. Illustration  
Adverse with-holding.  
 Limitation for suits. (c) attached to the section is barely an instance of the pure declaratory suit founded on an alienation by the widow of her husband's estate without legal necessity. Legislature have prescribed, following the language of the said illustration, the period of 12 years for instituting the declaratory suit,—the period being counted from the date of the improper alienation. But no appropriate Article of Limitation lays down a period of time for a claim of the same sort against the trespasser who has dispossessed the widow. Whenever such an action is instituted the governing Limitation Clause would be Article 120, the time running from the date of adverse dispossession.<sup>2</sup> Then, again, the plain wording of Art. 125 of

1. *Nobin vs. Guru*, B. L. R., Sup. Vol., 1008. *Radha vs. Ramdas*, 3B L. R., 362

2. *Ramasami vs. Thayammal*, 26 Mad., 488.

the Limitation Schedule makes the Article applicable only to the declaratory action brought by the *then* next reversioner. The remoter reversioner, even when justified to bring an action of the sort, is not apparently entitled to claim the privilege of the 12 years' rule ; because on the fiction of the widow's dying at the moment of the suit, he, the remoter reversioner, is not entitled to come in as heir. Even if two life-estates intervene, the remoter reversioner can sue in a proper case.<sup>1</sup> Mr. Mitra in his Law of Limitation quotes a number of rulings,<sup>2</sup> noted below for easy reference, which lay down that the limitation for remoter reversioners is governed by Article 120, the period of 6 years being computed from the time when the circumstances justifying his action become known to him. It is a principle of the Limitation law that

the race of time begins to run unceasingly.  
 Limitation goes on running. Therefore if the female heir makes an alienation

for no legal necessity ; or if the immediate reversioner is accused of any collusion with her in that respect, the race-horse of limitation labelled with Article 125 or 120 will begin to run from the time of the alienation or the collusion, as the case may be, until it is stopped in the course by the next or the remoter reversioner at the time of action. That is to say the remoter reversioner promoted to the first rank in the line of reversion will not be entitled to claim a new period for his declaratory relief to any point beyond the expiry of the 12th year from the date of the alienation ; and the cause of action for the declaration will not be revived in favour of reversioners who may be born after the expiry of the prescribed period.<sup>3</sup> It is a different matter, of course, when the presumptive reversionary interest ripens into a claim for the estate upon the death of the female heir.

It is necessary now to notice the complications that arise when collusive and fraudulent decrees are passed on the basis of alienations which could otherwise have been impeached for want of legal necessity. The question is what is the result of a collusive action and decision between the female heir and her alienee ? Such a result does not unfrequently happen and it is brought along to be set up as a bar against the near or remote

1. Kandasami vs. Akkammal, 13 Mad., 195.

2. Kalavathal vs. Thirupatha., 10 M. L. J., 229, Bhagwantha vs. Sukhi, 22 All., 33 (p. 41).

3. Pershad vs. Chedilal, 15 W. R., 1

reversioner's claim. The Allahabad High Court, in the case cited before, I. L. R. 8 All., 365, referred to the well-known *Shivagunga* case<sup>1</sup> decided by the Privy Council, and, in order to find whether there has been a judgment *in rem*, remitted, to the Court below the following issue for trial and finding :—"Was such a suit a genuine and *bond-fide* proceeding, contested and litigated honestly from beginning to end?"

An improper compromise of a fair case, withdrawal from it, negligently allowing the judgment to go by default, gross mismanagement of the case indicating or implying a design and a collusion are some of the matters that come within the purview of the above issue. If the finding on the issue were in the negative, the thorn in the way of the reversioner's claim is removed and his suit proceeds to its decision on merits, by the light of the Privy Council decision in *Rani Anund Koer's* case, to which reference has been already made. Their Lordships have observed :—"If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue."

It does not, however, follow from the above that every sort of consent by the reversioner to the alienation by the female heir is necessarily unlawful or wrongful within the meaning of the above-quoted Privy Council decision. The alienation may be absolutely without any legal necessity, but nevertheless, it may be backed by full and genuine consent of the next heir. When such is the case, can the next and the remoter reversioner come in and impugn the transaction as collusive? This is an important point for consideration, and it requires a discriminating and analytical study of the views of several High Courts to deduce if possible the correct result.

Collusive connivance and laches are among the circumstances which open the door for others, having remote and contingent interests in the property, to enter into the arena of litigation. It must have been seen that the remoter heirs and reversioners, before invoking the

Consent or concurrence is not collusion *ipso facto*.

Collusion, &c., defined.

the assistance of the Courts of law and of equity, are bound to set forth their right to claim. They are also bound to allege and prove the existence of the apprehended danger to their interests. That apprehension can never be reasonable, nor the danger real unless there has been fraudulent design to imperil the interests of the claimants. To impute collusion, connivance, wilful negligence, or such like, between the present heir and the presumptive reversioner, and to make that the justification for the claim, is to allege, in the language of Mr. Justice Story, an element of direct or constructive fraud against the present owner as *particeps criminis*. West and Bulher, in their learned treatise on Hindu Law, have classed the circumstances of collusion and such matter under the heading of *Franch*. The learned authors have instanced the numerous transactions that go by the name of *Benami* dealings, *sham* disposals and as typical illustrations of collusion. To the list may also be added all kinds of real and unreal transaction, more or less self-serving, which aim to injure the interests of others. "Collusion" has been defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice, or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds,—(1) when the facts put forward or the foundation of the judgment of the Court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.—*Wharton's Law Lexicon*, title "*Collusion*."

Thus, if a widow or any other female heir transfers her right by  
 Abandonment of right.      sale or gift, without any legal necessity whatever  
    to the next reversioner, the transaction has the  
 effect of a complete abandonment on her part of her present interest  
 in the estate. She thereby walks out of the scene, as it were, of the estate, and lets in the next reversioner to take her place in the inheritance. There is no collusion or deceitfulness in the transaction as such to justify the remoter reversioner to step in and to question. In a case<sup>1</sup> of gift by the widow to the daughter, the immediate reversioner, the

\* 1. *Bhupalram vs. Lachma*, 11 All., 253.

Court regarded the transaction as one which accelerated the succession, and reduced the estate into possession by anticipation as it were. Against this alienation, a remoter reversioner preferred his claim for the usual declaration. Two contentions were raised by the alienees. *First*, the plaintiff had no cause of action; *secondly*, his suit was not maintainable. The second contention was not pressed by the learned pleader Pandit Ajodhyanath, in deference, it would seem, to the current of views prevailing in that Presidency which have repeatedly affirmed and followed the principle that the intervention of a life-holder was *ipso facto* no bar to an action by the remoter reversioner. The daughter in this case did not collude with the widow, but she accepted the gift, and thus naturally incapacitated herself from impeaching the transaction. Thus the suit was held maintainable. But the first contention prevailed,

Discretion refused for declaratory action. Remote chance not precisely on the ground of no cause of action but because the Court refused to exercise its discretion under Sec. 42 of Act I of 1877. The ground for the refusal was that the interest of the claimant (widow's husband's paternal uncle's grandson) was too remote, and the donee was a married daughter, capable of bearing a son with chance apparent to acquire full rights over the estate. The claimant was a *Sagotra Sapinda* by common libations of water, and it was obviously thought needless to give effect to a precarious or a most uncertain chance against the tolerable certainty of the estate descending by a past stock of heritable rights by declaring in favour of a right that may never arise.

Reasons for refusal to grant declaration in case of surrender or abandonment. The case cited above was a suit for pure declaration of right, namely, for the usual declaratory relief that the alienation in question was void after the widow's death. The bare chance of the alienee's being capable of bearing a son with full rights of ownership was sufficient to lead the Court to exercise its discretion against the claim. It is not possible to lay down a precise rule in the abstract for the Court's discretion. That will depend on the circumstances of each case. For it is not possible to conceive what would have been the Court's decision if the daughter, in the case just cited, had been a sonless widow or a barren woman. The only reason for refusing the relief, which is otherwise legal and perfectly consistent

with technical law, would have been removed. Then again, the usual declaration could not have been possibly refused if the claimant had stood *pari passu* on an equal footing with the alienee or donee. Because if the case, by sale or gift, be of total and complete surrender, the claimant would reasonably say, "The widow has walked out of the scene, the inheritance has been vacated, and my chance which is equal with that of the alienee cannot be defeated either now or in future." If the surrender be in favour of a stranger, with the full consent or concurrence of one of the reversioners, the other reversioner or reversioners of equal standing may, I submit, very well claim either for the present or prospective annulment of the transaction, or, may at once bring an action to have the estate reduced into possession. "The surrender," says Dr. Mitra, T. L. L. of 1879 page 392, "must be in favour," we may add *with the consent*, "of all those persons who stand in the position of next takers after her. If the surrender is in favour of *some* of the next takers, to the exclusion of others of the same class, such an act will not be valid, because the excluded person will be entitled to complain, and as against him, the alienation will not be good." On this subject, the following remarks of the Lords of the Privy Council deserve careful consideration:—

"They do not mean to impugn the authorities which lay down that

Full concurrence of a transaction of this kind may become valid by all the near heirs. the consent of the husband's kindred, but the

kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction."<sup>1</sup> Strictly speaking this *dictum* of Privy Council does not improve the position much: because, (1) it is impossible to secure the concurrence of all possible heirs as it is impossible to predicate beforehand who would be the heir or heirs when the succession opens; and (2) consent of all "likely to be interested" to dispute is enjoined and it begs the whole question and leaves the matter to uncertainty.

A recent well-considered judgment<sup>2</sup> of the Calcutta High Court

Collusion or consent of immediate reversioner if female. has reviewed most of the leading authorities of the High Courts of India on the subject as to whether there should be any plea of collusion

1. Raj Luckee vs. Gokul, 12 W. R., 47. P. C.: 13 M. I. A. 209.

2. Abinash vs. Harinath, 32 Cal., 62,



or consent on the part of the immediate reversioner, if female, to entitle the remoter reversioner as a claimant of a Hindu widow's estate to institute the usual declaratory action to impugn the validity of an alienation by the widow if the same be not supported on the ground of legal necessity. The case was one governed by the Bengal School of Law, and its distinctive features were that the plaintiff, the remoter reversioner, was a male with prospective chances of full ownership, and that the intervening direct reversioner was the widow-mother of the late male incumbent of the estate. But the learned Judges have held, on general principles, a very broad rule of law that a declaratory suit by a remote reversioner, who would take an absolute interest, is maintainable in the presence of the immediate reversionary heir who is only the holder of a life-estate, under S. 42 of Act. I of 1877.

It deserves serious consideration that in the case before us there was not on the part of the claimant either plea or proof that the direct reversioner was guilty of collusion or consent in the matter of the alienations that were impeached in the case. The learned Judges have not further distinguished this case from the hitherto accepted view of the matter on the ground that the immediate reversioner was not only a female incumbent with limited rights but that she was also a widow mother probably in an advanced age of her life. Apparently the claimant was her grandson (son's son), and the principal defendant was her daughter-in-law (another deceased son's widow). The decision of the Court is based on a fundamental distinction which has been thus stated by the learned Judges: "There is a substantial distinction between the case in which a remote reversioner, who would take an absolute interest, sues for a declaratory decree in presence of a nearer male reversionary heir and the case in which such a suit is brought in the presence of a nearer female reversionary heir." No doubt the distinction is substantially correct. But what about the completeness of the analogy, hitherto universally accepted, between the case of one of several co-obligees suing the obligor on the basis of a joint contract and impleading the

Comments on the other co-obligees as defendants in the action, above ruling. and the case of the remoter reversioner suing for the annulment of an improper alienation after impleading the direct reversioner, male or female? Surely all the co-obligees stand among themselves on the same level, whereas the remoter reversioner occupies a much lower rank than the direct reversioner. In cases of this sort

the principle of impleading the necessary parties enjoined by the well-recognized adjective law on the subject should obviously be observed. Ordinarily speaking no single co-obligee can sue to enforce the contract on which the obligation is founded independently of the other co-obligees. On the same principle it would appear it should be held that the immediate reversioner, male or female, cannot be silently ignored. Not only should such a reversioner be made a party but there should also be clear averments why he or she is made a co-defendant in the action. In the case before us the High Court has practically given effect to the above principle and justified the mother-widow being made a co-defendant in the action by stating that her consent to the transaction in suit could be implied by reason of her long silence suffering the transaction to go unimpeached beyond the period prescribed by statute. Apparently the High Court in appeal did what the plaintiff should have done in his pleadings. One would think that the want of such pleadings in the averments in the plaint itself would be a ground for rejection of the plaint. But the learned Judges of the High Court in this case not only brushed aside this important principle of law but they also directed by remand an enquiry into the merits of the case, leaving untouched the main principle that in all cases of the female heir being the direct reversioner to the widow's estate the next male reversioner has an independent right of action. But it remains to be seen whether the general and sweeping principle laid down in the case should be implicitly followed in all cases. Suppose the intervening direct reversioner were a maiden or a newly married daughter, *i.e.* a person likely to beget a male heir of closer relationship and heirship than the person who was the plaintiff in the case under notice. Would it then be right or justifiable in principle to leave the stakes of such an important litigation in the hands of an irresponsible person,—irresponsible in comparison to the prospective grandson by the daughter in the hypothetical case suggested above? It is a settled principle of law that the result of a *bonâ fide* and well-conducted reversioner's suit binds the reversion. Turning again to our hypothetical case, would the nephew of the deceased husband of the widow daughter-in-law have the right to continue the action safe-guarding the best interests of the reversion if during the currency of the litigation the daughter had given birth to a son? Such a possibility of course could not arise in the case before the High Court because the widow-mother was expected to close her earthly career

and to open up the direct succession of the plaintiff in the suit. It should in such cases be distinctly remembered that the right of a remoter reversioner to sue is only a case-law development of Hindu Law. It is not prescribed or suggested in any illustrative principle of the legislature. Therefore it is incumbent on our Courts of law to be extremely circumspect as regards an action by a remoter reversioner in order to safe-guard the interests of the nearer reversioner. Without the elements of fraud, collusion, connivance, or consent there is absolutely no right of the remoter reversioner to claim the annulment of an alienation by the widow on the ground of want of legal necessity.

It is abundantly clear from the authorities that exist that any remoter reversioner is entitled to safeguard the estate in the interests of the reversionary heirs, if any improper alienation without legal necessity takes place. We have seen in the preceding pages how the scope of this principle has been enlarged since the Privy Council decision in *Rani Anand Kunwar's* case. But there have been some decisions of Courts which seem to lay down that the immediate reversioner, if female, can be ignored in the action. In a Madras case<sup>1</sup> it has been held that under the Hindu law obtaining in that Presidency a reversioner is entitled to sue to establish the invalidity of a sale by the widow of the last male holder, notwithstanding the fact that he left a daughter, who was alive at the date of suit, but was not joined as a party. The learned Judges have in this respect quoted with approval and followed a decision of a Bench of the Allahabad High Court.<sup>2</sup> The main question in the Allahabad decision which contains valuable discussions on the subject of the remoter reversioner's right to sue in the event of the nearest reversioner's collusion, acquiescence, or active or passive submission to improper alienation, is not now under consideration. But the support which the Madras decision receives from the Allahabad case is contained in the following significant passage in the judgment of Mahmood, J.: "In the case now before us, far from stating that the widow's daughter Phalera had either colluded with

1. *Raghupati vs. Tirumalai*, 15 Mad., 422.

2. *Balgobind vs. Ramkumar*, 6 All., 431.

her mother, or had consented to the sale, or had refused to join the suit, or had otherwise precluded herself from contesting the sale, the plaintiff did not in the plaint even allege her existence."—p. 434. It appears further that the aforesaid Madras decision was cited, among numerous other rulings, by Babu Golap Chandra Sarkar, the learned author of 'Hindu Law,' who appeared for the appellant in the recent Calcutta case, *Abinash v. Harinuth*, I. L. R., 32 Cal. 62, already noticed. I have shown in the preceding pages, while commenting on the decision of the Calcutta case, that there should be necessary averments in the plaint by the remoter reversioner against the nearest reversioner (male or female) to justify the institution of the suit. But the further step which the decisions now under consideration seem to suggest, namely that the remoter reversioner's action of the usual declaratory character can proceed without *impleading* the nearest female reversioner appears to me to be extremely bold and unwarrantable on principle. I admit I must approach this question with the utmost possible humility. Because, the three cases cited above, to say nothing of numerous others that might exist, are a strong array of authorities against me. But it is impossible to ignore the well-known principle of the Procedure Code, very well expanded and emphasized in Act V of 1908, Sch. I, Order I, Rule 3, which runs thus: "All persons may be joined as defendants against whom any right to relief

Who may be joined as defendants. in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise."

This is an express mandate of law on the subject. With reference to the particular point now under consideration it is easy to conceive the difficulties that would arise out of any deliberate departure from the principles laid down in the aforesaid Rule of the new Civil Procedure Code. It is plain, for instance, that if the omitted female reversioner, being first in rank to claim the relief against an improper alienation by a Hindu widow, were to institute another rival civil action in continuation of, or in opposition to, the action instituted by the remoter reversioner, there is nothing in the law, as far as I know, to prevent both the suits to proceed,

—no one can tell with what result for each! Such a thing cannot, I believe, be permissible in law or in practice. Then again, it would be unjust to leave the leading string of such an important litigation, which involves the direct question of heritage of the nearest reversioner though a female, in the hand of an irresponsible party. I call the remoter reversioner irresponsible, because after all he is a volunteer in the field of litigation. As his chance for ultimate succession is admittedly remote, what guarantee is there that he would prosecute the trial with due diligence? But whether he does so or not, the result arrived at, it is well-known, binds the actual reversioner. It could not be said that because the immediate female reversioner was not made a party in the case, it is open to her to re-agitate in the same matter to obtain a decision in her favour. We have to be all the more careful, in such complicated cases of reversioner's suits against improper alienations to see that all the necessary parties are marshalled before the Court with the respective interests in their keeping. To rebut the case of an apparent necessity for an alienation by a widow, more than ordinary care has to be taken. Therefore those that are directly interested in the estate cannot, it is apprehended, be safely omitted. The law embodied in S. 43 of Act I of 1877 closes the door against any subsequent action by the nearest reversioner even if the previous action by the remoter reversioner be deemed to have been wrongly decided. This is so, because to all intents and purposes a declaratory action by a reversioner is regarded in law as a complete representative suit between the reversion on one part and the parties to the alienation on the other. In a case of adoption by a widow in the High Court of Bombay<sup>1</sup> a declaratory suit against the adoption was instituted by a remoter reversioner. The Court held that the immediate female reversioner (a daughter) should have been made a party to the suit, with the necessary allegations of collusion or otherwise against her. But the Court allowed the omission to pass and did not think it necessary to reverse the decision on the ground of the non-joinder of the daughter as a party, because the property involved was a *watan* land to which, under the Bombay Regulation, the plaintiff and not the daughter was

1. *Ramabai vs. Rangrav*, 19 Bom., 614 (at p. 618).

entitled to succeed after the widow. But in the same Presidency of Bombay the daughter as a reversioner in other cases is the absolute owner in expectancy, and in the rest of India, she is the stock of a new line (*Bhinna gotra*) of descent. It therefore follows that if the intervening nearest reversioner be a minor daughter, married or unmarried, and if in accordance with the remarks made above she is deemed to be a necessary party, a proper guardian *ad litem* should be nominated for her by the Court. Such a minor girl is not made a party on the ground of collusion or consent,—because she is incapable of either,—but she is made a party by reason of her admitted priority of interest. It is the duty of the guardian so appointed to safeguard her interests in the estate, and such guardian should have no interest adverse to that of his ward.

The question of mutual rights of co-widows succeeding together to the estate of their husband has been long settled by their Lordships of the Privy Council in the celebrated case of *Bhagwandeem Dubey* repeatedly noticed in this book. It has been considered as an established fact that the widows constitute among themselves one juridical person and their estate of inheritance is looked upon in the light of a single estate. But if the owner regulates by will the order of succession and precedence amongst his co-wives, the one lower in rank may be regarded as a reversioner entitled to bring declaratory or possessory action annulling an improper alienation effected by her predecessor without any legal necessity. An illustration of this principle is to be found in a later Privy Council decision.<sup>1</sup> The facts of this case appear to be that as against the wrongful alienation by a senior widow (who by virtue of her husband's will had a prior claim to the estate for her life) two suits were instituted: one by the widow next in rank, and the other by a remote male reversioner. Though these two concurrent claims were allowed to proceed simultaneously in India, and though both were heard and decided together by the Privy Council, yet it was remarked by their Lordships that "two concurrent declaratory suits were unnecessary at the present time, and that it would not have been unreasonable if the first Court had, as a matter of discretion,

1. *Ramanand vs. Raghunath, and Anant vs. Raghunath*, 8 Cal., 769.

declined under the circumstances to grant declaratory relief to the more remote remainderman." It is plain that in the case before their Lordships the claimant-widow was held to occupy the position of the nearest reversioner by virtue of her husband's will which was held to be binding on the ladies. But even then, it is more than doubtful at the present time whether two concurrent claims by the near and by the remote reversioner for the same relief would be permissible by our Courts of law. If the nearest reversioner brings his action, the suit is now regarded as a completely representative one in the interests of the whole reversionary line. It is further abundantly clear that if the co-widows conjointly succeed to their husband's estate with equal rights of inheritance and survivorship, the question may arise whether two such actions are permissible, and whether if a co-widow sues to set aside an improper alienation by her rival, the nearest reversioner can come in at all. The co-widow's claim would be, as it cannot otherwise be, for direct possessory relief; under the principles of law explained by the Privy Council she is not entitled to declaratory action under the provisions of S. 42 of the Specific Relief Act, because she is fully entitled to the consequential relief of possession. It will be remembered, as I have noticed elsewhere, that to justify an alienation by a co-widow of any part of her husband's estate the transaction must be supported not only on the ground of legal necessity but it must also have the support of the consent of the other co-widow. Such being the case, it is needless to point out that the *obiters* that occur in some of the Indian cases (e.g. I. L. R., 6 All., 436; I. L. R., 15 Mad., 423) cannot be followed, *viz.* that any reversioner can bring an action ignoring or without impleading a co-widow. In such a case, it is submitted, the reversioner must state the grounds for making the co-widow a party to the suit.

The relief by way of declaration or possession cannot be refused even if the case is not one of complete surrender, though consented to by the presumptive heir. For any kind of transfer less than full abandonment, without the support of legal necessity, the reversioner, next or equal in rank, will be entitled to challenge the alienation as not affecting his possible rights after the transferor's death.<sup>1</sup> It must be a

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1. Marudamuthu vs. Srinivasa Pillai, 21 Mad., 128.

complete relinquishment or a conveyance *in presenti*, such as a valid gift *inter vivos*, and not a transfer by way of mortgage, lease, partial gift, or testamentary disposition. The case of *Beharilal v. Madholal*, 1. L. R., 19 Cal., 236, P. C., is one in point, followed in Madras.<sup>1</sup> The Madras case was an instance of fraudulent consent given by the next reversioner to an alienation made without legal necessity. The necessity for the alienation was urged in the first instance. That failing, the transaction was intended to be supported on the ground that it was valid, and created an absolute estate, independently of legal necessity; because the alienation was assented to, as it really was, by the nearest reversioner. Their Lordships

Complete surrender otherwise remarked :—"Now to admit of the doctrine of law laid down in the case<sup>2</sup> cited being applied, it should be shown that the widow's estate was completely withdrawn, so that the whole estate should get vested at once in the grantee as effectually as if the widow had renounced in favour of the nearest reversioner, and the latter as full owner had conveyed the property to the grantee. But this is not the case here, as one of the items of the property in question purports to have been transferred by way of mortgage only. Even if the transaction was really a mortgage, the widow would be interested as the holder of the equity of redemption. Moreover both the Courts find that the debt, on account of which the mortgage is said to have been executed, was never due. Consequently the land comprised in the instrument of mortgage must be taken to be her property still. Her life-estate not being at an end, the foundation for the application of the rule of law relied upon on behalf of the appellant fails and the second appeal is dismissed with costs."

The Privy Council decision relied on and referred to by the Madras High Court was an appeal from the High Court of Calcutta. It was, however, a case that originally arose in the District of Gaya, where the law of the Mitakshara prevails. Consequently the view of law laid down by the Judicial Committee is no peculiarity of the Bengal School which will be presently discussed. There

The views of the Mitakshara School.

1. *Kolandaya vs. Vedomuthu*, 19 Mad., 337.

2. *Beharilal vs. Madholal*, 19 Cal., 236, P. C.



is nothing to prevent the female heir to destroy her life-estate, and if she does so by complete relinquishment of her estate in favour of or with the consent of the next reversioner, the title is absolute and indefeasible. "It may be accepted," say the Lords of the Privy Council, "that according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate." It is a plain deduction from the decision of the Judicial Committee that if the widow had effected a complete conveyance in favour of her daughter's son (his mother's consent is of course implied), the other daughter's son, born after the grant and surviving the widow, would at her death acquire no interest in the estate. In another case<sup>1</sup> before the Privy Council, the relinquishment was by sale without any justifying necessity with the consent of the nearest reversioner. Though the alienation purported to convey an "absolute" estate yet, the Courts below having found that no more than the widow's life-estate was transferred or intended to be conveyed, the alienee did not get anything more. The main ground for the Court's putting such a construction on the deed was the inadequacy of consideration in reference to the value of the estate, and payment of nothing to the near reversioner to buy off his consent. If these elements were wanting, or if there was nothing to indicate that less than full interest was conveyed, but that the absolute interest was intended to be and was actually transferred, the alienation would undoubtedly vest full ownership on the alienee. This, then, is another decision from the Mitakshara country of the N. W. Provinces.

In the Province of Bengal, the current of rulings from the very earliest date, that is from the time of the *Sudder Dewani Adawalat* and the Supreme Court upto now has been to lay down the rule that an alienation, transfer, or surrender by a female heir to the next reversioner or to any other person with his consent would create an absolute title unimpeachable after her death, and therefore, in her life-time also. Compare the long list of rulings from the time of *Jadumani's* case (1 Boulnoi's Report, p. 120) upto the date of *Hemchunder v. Sarnamoyi*, I. L. R., 22 Cal., 354. Some of the important intervening cases are the following :—

Bengal view as to widow's surrender.

<sup>1</sup> *Jiwansingh vs. Misrilal*, 18 All., 146. F. C.

*Protapchunder v. Sreemati Joymonee*, 1 W. R., 98; *Shama Sundari v. Surut Chunder*, 8 W. R., 500; *Rojoni Kant v. Pranchund*, Marshall, 241; *Mohankishen v. Busgeet Roy*, 14 W. R., 379; *Gunga Pershad v. Shumbhunath*, 22 W. R., 393 (this decision was by Mr. Justice Romeschunder Mitter sitting alone, but was appealed against under the Letters Patent, and confirmed on appeal by Sir Richard Couch and Mr. Justice Ainslie, Letters Patent Appeal No. 1990 of 1873); *Rajbullub v. Oomesh Chunder*, I. L. R. 5 Cal., 44; *Trilochan v. Umeshchunder*, 7. C. L. R., 571.

The High Court of Bombay has felt some difficulty to follow the view of Bengal in this subject in its entirety. Jenkins, C.J. of the Bombay High Court considers that in one word the Bengal view resembles the English doctrine of "merger," and that in all cases it would not be proper to apply that doctrine to the estate of a Hindu widow according to the strict Hindu notions on the subject. Before considering the prevailing view of the Bombay school, it is necessary to remark that the Bengal view of surrender or release has apparently been approved by the Allahabad High Court :—See *Ramphal v. Tula*, I. L. R., 6 All., 116. The Judges of the Bombay High Court have held from an early time that the governing principle deducible from the Privy Council decisions is somewhat different from the view of Bengal and of Allahabad, and that even with the consent of the next reversioner the creation of absolute interest by the alienation by the widow of her estate would also depend on the fairness and propriety of the transaction on its merits.<sup>1</sup> In one respect, however, the Bombay High. Court appears to be in agreement with the prevailing view elsewhere : and that is, if the surrender, release, or alienation by the widow has the full support of the immediate heir, it is not necessary to pry closely into the strict legal necessity of the transaction. In the Bombay case, noted above, and reported in Vol. XXV, which, so far as the rulings upto that time of Bombay and of Calcutta go, sets up the contrast between the standing views of both these High Courts (see I. L. R., 22 Cal., 354), the widow sold lands with the consent of her deceased husband's sister's son, without the

1. *Varjivan vs. Ghelji*, 5 Bom., 563. *Venaik vs. Gobind*, 25 Bom., 120. *Collector of Masulipatam, vs. Cavalay Venkata*, 8 M.I.A., 500 (551). *Rajlukhee vs. Gokul Chander*, 13 M.I.A., 209 (228).

consent of the latter's mother, that is, the deceased's sister. The object of the sale was to celebrate the marriage of the consenting remoter reversioner, which, as put by Mr. Justice Ranade, was not an act of legal necessity ; because the marriage of a sister's son did not conduce to the spiritual welfare of the deceased husband, and did not constitute a pious purpose recognized by the Hindu Law in force in the country. For this reason, there was, in the Bombay case, the concurrent and binding finding of the Courts below that the transaction had not the support of legal necessity in addition to the fact that the consenting reversioner was not the direct and the immediate heir for the time being. Yet, the plaintiff was not allowed to succeed ; because he was the offspring of the marriage of his father which was brought about with the proceeds of the widow's alienation. There was a sort of equitable estoppel against the claim. It is not difficult to see that the result of the decision would have been otherwise if the plaintiff, in the Bombay case just cited, had been the son of another sister.

The test of fairness and propriety of the transaction assented to by the reversioner is the prevailing doctrine of the Bombay Presidency in this respect. The test though not quite the same thing as legal necessity, is undoubtedly much like it. If the transaction has not the support of legal necessity, and is at the same time of doubtful propriety, it would be revolting to hold that the actual reversioner at the time of the widow's death should find that his rights had been signed away by the consent of one who, when he consented, had a preferable title in expectation. Yet this is the gist of the Calcutta Full Bench case in *I. L. R.*, 10 Cal., 1102, which is reported to have laid down that " a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer having been assented to by the person who at the time is the next reversioner, will conclude another person, not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property."

In *I. L. R.*, 22 Cal., 354., the relinquishment by the widow of her life-estate was assailed by the reversioner as invalid for want of legal necessity. But with reference to this subject, the Court held the two following rules of law as well-settled (page 361):—

"First, the widow may relinquish the whole of her interest in her husband's estate, and then the next reversioner will acquire the estate absolutely. The reason of this is that it is the intervention of the widow that postpones the succession of the reversioner, and if she walks out of the scene, she thereby anticipates for the reversioner the time of his succession.....

"Second, the widow may convey to the next reversioner or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest."

The Court had to admit that the second proposition is not reconcilable, in its broad generality, with Hindu Law, as laid down in the original texts. Those texts have laid down that the reversioner's claim is determined by the event of the widow's death, civil or natural, whichever happens first, and that strict law can not otherwise anticipate the event. The Calcutta High Court has further remarked that under the tenets of the Dayabhaga, the recognized text of the Bengal school, the consent of her husband's kindred is necessary to make the widow's alienation to a stranger valid and unimpeachable.<sup>1</sup> But the view of the orthodox and technical law apart, their Lordships felt compelled under the pressure of the current authorities in Bengal, to hold that a conveyance by a female heir of her life-estate by sale, gift or otherwise, to, or with the consent of, the next taker of absolute estate, will create an absolute estate in favour of the transferee, and that the result is not dependent for its support on the justification of legal necessity. In this respect, the rule of *Stare decisis* has been respected, so far as the Presidency of Bengal is concerned. That rule, undoubtedly, is of great use and is of sound and good policy in the quieting of titles. But, says Mr. Mayne, "if no similar current of authorities exists in the other Presidencies this decision would, of course, have little weight with them."<sup>2</sup> It would have been a boon if that learned commentator, Mr. J. D. Mayne, had not barely thrown

Rule of law on this subject in the other Provinces.

1. Raj Luckhi v. Gokul, 3. B. L. R., 57, P. C.; 13 M. I. A., 209; 12 W. R. 47, P. C.

2. Mayne's Hindu Law, 7th Ed., page 860, Sec. 63B.

a general hint like the above, but had pushed his usual energy and his marvellous capacity for gleaning in discriminating the view of law, followed in the rest of British India, on this very important point. The transactions among the members of the Malabar *Taravads*, referred to by Mr. Mayne in the next para (639) bear a distant analogy to the Bengal view. The decisions<sup>1</sup> of the Mitakshara country in the provinces within the jurisdictions of Calcutta, Allahabad and Madras High Courts, already referred to, including as they do the view of law adopted by the highest tribunal in the land, the Lords of the Privy Council, are a strong commentary against a series of standing decisions of the High Courts, chiefly of the North Western Provinces, in so far as they purport to lay down the principle that a valid estate cannot be created by a Hindu widow by transfer out and out with the consent of the immediate reversioner.\*

In two important decisions<sup>2</sup> passed by the Judicial Commissioner at Nagpur, one in the year 1886 and the other in the year 1906, the question of consent of the next reversioner (in one case a male, and in the other a female) has been discussed. It has been found that direct consent at the time of the transaction is not the only way to establish its existence (Cf. I. L. R., 30 All., 1, P. C.). Presence at, knowledge of, and finally not taking action to impugn the transaction within the statutory period, in other words bare silence not to sue in time, have been regarded as constructive consent. Whether we can go so far as that, and implicitly accept the broad generalizations made by the learned Judicial Commissioners in the cases cited above, is more than doubtful. But I cannot help remarking that if I am right in inferring from the names of the parties that they were Maharatta Brahmins or Maharatta Sudras domiciled in these provinces, there has been no attempt in either of the two cases under notice to distinguish them with regard to the principles now under consideration

1. *Beharilal v. Madholal*, 19 Cal., 236 (P. C.). *Jewan Singh v. Misrilal*, 18 All., 146 (P. C.). *Kolandaya v. Vedamuthu*, 19 Mad., 337.

2. Compare—*Ramphal v. Tula*, 6 All., 116 (F. B.); *Madan Mohan v. Puran*, 6 All., 288; *Jhula v. Kamtha Prasad*, 9 All., 441, *Ramadhan v. Mothura*, 10 All., 407.

3. *Krishna v. Ganesh*, Select Case No. 25 (1886). *Anand Rao v. Bansinath*, 3 N. L. R., 35.

from those of the rest of India. It must be conceded that among the congeries of races who have come to settle and who are yet settling in these provinces, the personal law of the parties is a matter of the first concern. In the later decision of the Judicial Commissioner, if we hold, particularly by the light of the views expressed in the earlier case, that Gajrabai, consented to the sale by her widow-mother in favour of her husband, and if we regard that she as a daughter was not merely a reversioner but an heir to the absolute interest in the estate under the well-known doctrine of the Bombay School, it is impossible to distinguish the case from the settled view of the rest of India, with the sanction and lead of the Privy Council decisions, viz. that an alienation by the Hindu widow to or with the assent of the direct male reversioner conveys an absolute interest. This is practically the halting ground beyond which the Indian Courts refuse to go. The further complications arising out of the contingent interest of remoter reversioners are not allowed to justify an action by them to impeach the transaction, assented to by the direct male reversioner, on the ground of collusion and want of legal necessity. I would go further and point out that in the Presidency of Bombay the daughter-reversioner is possessed of no less interest than that of any male reversioner. If that was so it is hard to see how the sale consented to by Gajrabai to her husband could in any way be assailed by her son Anundrao. Though it is true that there was no finding on the 8th issue recorded by the first Court yet the learned Judicial Commissioner Mr. Drake-Brockman has observed: "Gajra Bai's conduct and statements are explicable only on the theory that she accepted as binding upon her the sale effected by her mother which all the parties here admit to have been a genuine conveyance for valuable consideration."

This passage occurs at p. 39 of the Report. C. P. Rulings on reversioner's consent doubted. It practically amounts to a finding that there was constructive consent on the part of Gajrabai to the sale effected in favour of her husband. If the parties were really governed by the Bombay School of law such a consent would conclude the title in favour of the purchaser. I have not been able to lay my hand on a precise case of the High Court of Bombay discussing the effect of a daughter's consent to an alienation by her mother. Having regard for the interest which the

daughter or sister possesses, as a reversioner, in that Presidency it would be difficult to differentiate a case like the above from other cases in Bengal and in Upper India where alienations by a widow are assented to by the nearest male reversioner. In that view of the matter it must, I fear, be conceded that the ruling of the Judicial Commissioner at Nagpur passed in 1906, which is now being considered, inunciates a wrong view of law; because, the learned Judge has gone the length of declaring a relief in favour of the daughter's son in the life-time of his mother. Similarly in the earlier case the learned Judge Mr. R. J. Crosthwaite has construed the long silence, or for the matter, expiry of the limitation period during the life-time of the widow as tantamount to consent. If that be the view of the learned Judge we must most respectfully beg leave to differ. We are now considering the doctrine of consent by the direct reversioner, male or female. The theory of consent must be carefully distinguished from connivance, supine indifference, defiant silence, nay further, from collusion. There exists a very broad and definite margin between the two, and there is absolutely no chance or likelihood to mistake the one for the other. In conformity, therefore, with the settled view throughout the country, we are bound to hold that if the nearest reversioner is mixed up in the matter of the widow's alienation in such a manner that his or her direct consent to the transaction cannot be found, the remoter reversioner can step in and challenge the transaction with the necessary averments against his predecessor in title, *i.e.*, the immediate reversioner. It should be remembered that the limitation-bar against such a claim is a different matter.

In a decision passed by the Madras High Court in 1904<sup>1</sup> the facts as found by the Courts are briefly these: A remoter reversioner of the third grade brought a declaratory action during the life-time of the widow and impleaded with her as the first defendant all the reversioners of the first and second grades.

Madras view regarding reversioner's consent, collusion, &c.

The scope of the action was to set aside an alienation really effected over quarter of a century before the institution of the suit. The transaction was impeached on the ground of want of legal necessity, although the same had culminated in Court's decree and execution-

1. Govinda v. Thyammal, 28 Mad., 57.

sale over sixteen years before the institution of the suit. It was found as a fact that the original mortgage of 1871 had the support of legal necessity, though to the extent of Rs. 75 only. The further findings in the case were the following: that the first grade reversioner had assented to the alienation, and that the second set of reversioners (who were admittedly superior in rank to the plaintiff, and who included in their number the father of the plaintiff himself) had by their long silence and omission precluded themselves by reason of the limitation bar from bringing the usual declaratory action. We are not here concerned with the question of the plaintiff's minority or of the limitation for the suit; because, these do not concern our subject. We might, however, state by the way that the broad view of the limitation question in such cases which we have taken in an earlier chapter has been very forcibly and pointedly considered by the learned Judges. The lapse of twelve years prescribed for the nearest reversioner is not the expiry but the date of birth for the commencement of a fresh term of limitation for each succeeding reversioner of the lower grades. But the ruling under consideration marks out in bold relief a violent departure from the principles of remoter reversioners' actions for declaratory or possessory remedies which have been settled, I may safely say, in the other Presidencies of India. The learned Judges of the Madras High Court have apparently followed the plain wording of the decisions of the Privy Council which have been quoted in the judgment. A portion of the *dictum* of their Lordships of the Privy Council is noted below for reference: "If the nearest reversionary heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue: see *Koer Goolab Sing v. Rao Kurun Sing* (14 M. I. A., 176). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearer reversioner to be made a party to the suit."

The High Court of Calcutta, and in its strain, the Courts of the United Provinces and Bombay, have acted in no disrespect to



the above *dictum* of their Lordships by exercising the discretion which has been granted in the concluding part of the aforesaid quotation. In other words, the Courts have laid down the law of rest on the subject by ruling that when the nearest reversioner consents to or concurs in an alienation by a female heir an absolute interest in favour of the alienee is thereby created. In that case it is impossible for the remoter reversioner to contest the alienation on the ground of want of legal necessity. The doctrine of acceleration of right is not confined to the case of wholesale surrender by the widow, assented to by the immediate reversioner. It is also applicable to a single act of alienation of any portion of the estate in the possession of a Hindu female heir. The decision of the Madras Court which is now being considered is undoubtedly consistent with the *dictum* of the Privy Council in its entirety. It is also consistent with the views of archaic texts of Hindu Law from which the conception of the contingent interests of the remoter reversioner has sprung. Still for all that, this judgment of the Madras High Court marks a clear and deliberate departure from the principles which are well-settled in India. If we refer to nothing else but only to one aspect of the aforesaid Madras decision, *viz.*, that among the consenting nearer reversioners the father of the plaintiff himself figured as a defendant in the case, the gravity of the situation as a matter of departure from the settled law in the country will be at once realized. It is no doubt true that the plaintiff as a son did not derive his title in his reversionary interest from his father, but that his contingent chance of heirship was traceable to and deducible from the last male owner who died in 1870, independent of the intervention for the time being of his own father. Yet let us suppose that in an ordinary case of a Hindu widow with direct male reversioner in the person of her deceased husband's brother's son, if the said reversioner assents to sign away his direct and presumptive interest by consenting to a sale by the widow of the whole or a portion of her heritage for an ostensibly good purpose, would the Madras High Court go the length of justifying an action by the son of the presumptive reversioner to impeach the transaction on the ground of want of legal necessity? <sup>1</sup>

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1. Impliedly disapproved in *Chiruvolu vs. Chiruvolu* 29 Mad., 390, F. B.

If the Madras Court sanctions such a litigation,—as undoubtedly the recent ruling (I. L. R., 48 Mad., 57) is an ample authority for it,—surely the other High Courts with a strong array of rulings by their side will stand against that view. But on the other hand, if the presumptive reversioner in the hypothetical case be in collusion with the lady in her act of improper alienation, or if he stands by and observes supine silence during the whole course of statutory period prescribed in his behalf, the Courts of India are unanimous in laying down that the remoter reversioner will have his right to sue within six years under Article 120 of the Limitation Schedule.

We are now bound to accept it as a settled view all over the country, supported by a general consensus of rulings of all the High Courts in India, that an alienation by a Hindu widow of her husband's estate consented to or ratified by the next reversioner creates an absolute estate in favour of the alienee, whether he be the said reversioner himself or a stranger. To this proposition, we must remember, an important condition has been imposed by a series of rulings of the Bombay High Court by way of demurrer: it is this, that whereas such an alienation need not have the full support of strict legal necessity the transaction should be, in the opinion prevailing in Bombay, reasonable and fair on merits. The Privy Council decision<sup>1</sup> passed in 1907 on an appeal from the High Court of Allahabad recognizes with approval the aforesaid unanimity of views of the Courts of India. But their Lordships disavow the view of the same High Court in so far as it seeks to impose restriction on the widow's power to surrender in favour, or alienate with the consent, of presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death. It is obvious that such a restriction is inconsistent with the aforesaid principle itself. The Lords of the Privy Council had, in this connection, before their eyes the Full Bench decision<sup>2</sup> of the Allahabad High Court which was passed in the early eighties of the last century. It was a case of gift by a Hindu widow of her estate of inheritance with the consent of the nearest reversioner

<sup>1</sup> *Bajrangi vs. Manokarnika*, 30 All., 1. (P.C.)

<sup>2</sup> *Ramphal vs. Tula*, 6 All., 116.

alive at the time of the gift. Admittedly then it was an alienation of property by the widow without any legal necessity at all, nay it was a transfer without consideration. The learned Judges of the Allahabad High Court apparently considered the transaction to be inequitable and a serious encroachment, by anticipation as it were, on the rights of the actual reversioner at the time of her death. Whatever may have been the view on the subject at the time the decision was passed, it is undoubtedly clear by the light of the recent decisions of all the High Courts (including the Allahabad Court) that the *dictum* of the aforesaid Full Bench ruling has practically been abandoned by our Courts in India. It remained, however, for the Privy Council to declare that the aforesaid restriction placed by the Allahabad Full Bench on the widow's power is at variance with the prevailing and settled view in India on the subject. This practically reverses completely the view of the Full Bench case noted above. But their Lordships have gone farther: they have laid down that they are unable to sanction any further extension of the widow's power to alienate her husband's estate with the consent of the reversioner, than what has been accepted in the Courts of this country. But it will be seen later on that there has been from very early times a continuous growth and development of ideas on the subject of widow's rights to alienate with reference to the doctrines of legal necessity and of concurrence or consent of the reversioner or reversioners for the time being.

Ratification by next reversioner.

Their Lordships themselves in their recent decision on the subject have propounded the doctrine of subsequent ratification with retrospective effect to validate the antecedent alienation by the widow. With all humility I must submit that this doctrine by itself involves a very serious and anomalous departure from, and probably a very bold addition to, the principles hitherto known in the country. The doctrine includes a plain and indirect hint that if a remoter reversioner seeks to nullify an improper alienation by a Hindu widow and to her transaction the nearest reversioner for the time being be a colluding party, the latter by a breath, as it were, can blow away the litigation by converting his collusion into consent. It is a settled view of law that the interest of any reversioner near or remote is not a *res commercium*. Yet we have it in the

Privy Council case under notice the instance of a speculative bargain by which the ratifying reversioner sold his consent for value. I fail to see any distinction between such ratification and a collusion of the worst sort. We have, however, to bow to the *dictum* of the highest authority in the land. But to what anomalous position on this subject of the law we are now landed I am unable to describe. Otherwise, in accordance with the well-known *dictum* of the leading Privy Council case on the subject, *viz.* the case of *Rani Anund Koer*, there are various grounds under which a remoter reversioner can step in and protect the future rights of reversion impleading the closer reversioner as a party. The theory of ratification now propounded would, I imagine, be fraught with immense potentiality to decide the ultimate fate of the remoter reversioners' suits.

We find it again laid down in a decision<sup>1</sup> of Calcutta passed in June, 1908 that an alienation by a Hindu widow of a portion of her husband's estate, without legal necessity, but with the consent of the next reversioner, is valid. The purpose for which the alienation was effected was to grant a piece of land to the alienee for value in lieu of marriage dower. The said marriage was of the widow's daughter's son,

Daughter's son's marriage is not legal necessity.

and thus the sale of the land was assented to by the daughter as well as her son. It was admitted by both the parties to the case that the aforesaid purpose was not in the category of legal necessities. The daughter and her son having died in the life-time of the widow a possessory action was brought after her death by the actual reversioner who was entitled to succeed to the estate. We would assume that the rest of the undisposed of estate quietly came into the hands of the claimant. Under the prevailing views on the subject of partial surrender by the Hindu widow of her husband's estate to, or by the consent of, the nearest reversioner, it was strongly contended before the High Court that the alienated land should revert to the claimant as there has not been complete withdrawal by the widow from the estate. But the learned Judges after distinguishing the several rulings quoted in support of the contention and dissenting expressly from a well-considered decision<sup>2</sup> of Madras, have held that such partial alienation of the

1. *Pulin vs. Bolai*, 35 Cal., 939.

2. *Marudamuthu vs. Srinivasa*, 41 Mad., 128.

estate with the assent of the next reversioner is equivalent to *pro tanto* surrender of the inheritance. But it is apprehended that behind the Madras case cited above there are numerous other rulings, including the views of their Lordships of the Privy Council, which go to establish that nothing short of complete and unconditional retirement of the widow from her heritage would let in the next taker of her husband's estate. The doctrine of acceleration depends upon such withdrawal from the estate as is equivalent to death, natural or civil. It is true that in the aforesaid case before the High Court of Calcutta the object of the transfer did not come under the technical group of legal necessities; but there can be no doubt that the transaction was extremely reasonable and fair, *viz.*, to marry the heir-apparent to the estate. But suppose the alienation were an inequitable gift or a fraudulent sale or a wasteful alienation of any other sort, it would then be indeed a startling proposition to lay down that the alienation conferred a valid title on the alienee to the prejudice of the plaintiff. The assent of the predeceased reversioner could not be read as a legal necessity to justify perpetuation of the grant. If in any case of improper transfer by a Hindu widow of a part of her husband's estate, such transfer is assented to by the nearest reversioner for the time being and the said reversioner dies in the life-time of the widow, it is a question whether the next reversioner who comes up in front can be precluded from seeking the usual declaratory relief on the sole ground that his predecessor in interest had endorsed the transaction. Yet, I fear, this would be the logical result of the recent Calcutta ruling.

We find it laid down in a recent case<sup>1</sup> of Allahabad that where the widow retains a claim upon the estate purporting to relinquish possession thereof to two persons who at the time were the next reversioners, they agreeing to pay her a maintenance allowance, then the nearest reversionary heir at the time of the widow's death is entitled to succeed if the reversioners put into possession by the widow predeceased her. The learned Judges deduced this principle from a decision of the Privy Council in *Behari Lal v. Madho Lal*, 19 Cal. 236, where their Lordships are reported to have remarked: "It was essentially necessary to withdraw her own life-estate so that

Complete surrender essential.

1. *Rajkishore v. Durgacharan*, 29 All., 71.

he whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such conveyances." It was therefore pointed out by the High Court that the early decision, passed by the same Court and reported in I. L. R., 6 All., 116 being in direct conflict with the views expressed by the Privy Council, could no longer be supported. We have just noticed an express dissent of the aforesaid ruling, by the Privy Council in a more recent case. But on the question of fact the Court held that there was not complete withdrawal from the estate by the widow, and that therefore the ultimate succession remained open during her life. There is indeed a line of distinction between partial hold over the whole estate and complete hold over a part thereof alienating the rest. This distinction has been very strongly emphasized by the two recent rulings, one of Allahabad and the other of Calcutta, just noticed. With respect to the Calcutta case it must be said in support that it is in consonance with the prevailing view that a complete estate is created in favour of a widow's alienee if the alienation is assented to by the reversioner for the time being, because "the widow may convey to the reversioner or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute estate"—I. L. R., 22 Cal., 354. The recent Privy Council decision in I. L. R., 30 All., 1 is directly in support of this proposition. But with respect to the Allahabad case it may be remarked that the question of surrender by the Hindu widow to the then existing nearest reversioners has been more strictly construed. It appears to me that the result of the decision has been hard on the heirs of the preceding reversioners who were prior in rank to the remoter reversioners who succeeded to recover the estate. I do not know how far it is right to say that because the surrendering widow retains for herself only a claim for maintenance out of the income of the estate surrendered, it therefore necessarily follows that real surrender has not been effected. It is not supposed that the surrendering widow should leave home or live by begging. On a strictly orthodox Hindu point of view the surrender by a widow does not necessarily mean entering into religious order or shaking off all sorts of secular existence. If a widow giving up her estate goes and settles, say, in the holy city of Benares, and if just to keep her alive she gets the remittance of a bare starving allowance; or if she chooses to live at home but renounces all

connection with the estate in a *bona fide* manner; it would I think be very unfair if upon her death subsequent to the death of the nearest reversioners, the remoter reversioner were to succeed to dispossess the heirs of the original recipients of the estate who were the nearest reversioners at the time of the surrender by the widow. The decision in the

Alienation is not surrender.

Madras case in I. L. R., 21 Mad., 128 (F. B.)

which has been expressly dissented from in the

Calcutta case noticed above, is based on the

fact that the learned Judges considered the alienation of a part of the property by a Hindu widow in the light of partial surrender by her. This appears to me to be the chief reason why some of the early rulings of the same High Court were commented upon and dissented from by the Full Bench. Those early rulings were in strict conformity with the prevailing views on the subject of widow's alienation with the consent of the next reversioner. There is no reason why the single act of alienation of a definite portion of a widow's estate should be looked upon in the light of a *pro tanto* surrender. The prevailing theories in respect of surrender and of alienation with or without legal necessity are altogether of different natures. There is no wonder therefore that the deviation of views inunciated in the Madras Full Bench case is due primarily to the altogether different standpoint from which the decision was arrived at.

It is very difficult to reconcile the present views of the High Courts of India on the subject of widows' alienations of estate with the consent of the nearest reversioner. I do not find in the pronouncement of the recent decision<sup>1</sup> of the Privy Council sufficient or clear authority for holding that the discrepant views and the different shades of opinions that now prevail in India have been set at rest with anything like consistent uniformity. It has been already noticed that their Lordships of the Privy Council in the case cited above have expressly dissented from the Allahabad Full Bench decision in I. L. R., 6 All., 116. But can it not be said that the Allahabad case finds ample support from the Madras Full Bench decision in I. L. R., 21 Mad., 128? I will not for the present consider the trend of views of the Calcutta High Court. From the

High Courts' variance on the effect of nearest reversioner's consent. Legal Necessity, surrender of widow's estate.

1. *Bajrangi v. Manokarnika*, 30 All., 1.

very earliest time a long series of rulings of the late Supreme Court and Sudder Dewani Adalut have received an emphatic confirmation with respect to the subject of widow's alienations with the concurrence of nearest reversioners in the celebrated Full Bench case reported in I. L. R., 10 Cal., 1102. Again, starting from the time of this Full Bench decision we come to the most recent decision in I. L. R., 35 Cal., 939 wherein Rampini, A. C. J. and Ryves, J. having deliberately adhered to the time-honoured traditions of the same High Court have laid down that an alienation by a Hindu widow of a portion of her husband's estate, without legal necessity, but with the consent of the next reversioner, is valid. It follows therefore that to the ears of the Bench and Bar of the leading High Court of India the strain of thoughts and reasonings of Sir Andrew Scoble who voiced a strong array of eminent Judges composing His Majesty's Privy Council, will fall as an absolutely consistent reading. But can we say with as much or even any certainty at all that the decision of this Privy Council case settles the views of the other High Courts of India? Their Lordships have indeed noticed the decisions<sup>1</sup> of Madras and Bombay. But there is not in the judgment of the Privy Council any expression of dissent or disapproval as regards the final results in the Madras and Bombay decisions. With respect to the former we read in the Privy Council a quotation from the remarks of Mr. Justice Subramania Ayyar which contains his general concurrence with the prevailing views of the Madras Presidency in conformity with the settled view of Bengal, *viz.*, that an alienation by a widow with the consent of the nearest reversioner creates in favour of the alienee a valid and an absolute estate. Their Lordships stopped short of this quotation. But they did not stoop to consider the very divergent result which the Madras Full Bench arrived at. The case before the Privy Council was apparently an instance of the gradual withdrawal of the widow, by alienation after alienation from 1872 to 1875, from the estate of inheritance in her charge. The said withdrawal was made in favour of her son-in-law, and it may be that the subsequent ratifications of a series of successive reversioners stamped the transaction with the seal of finality and validity which in the opinion of their Lordships it appeared to be inequitable and unjust for the son and heir

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1. Marudamuthu v. Srinivasa, 21 Mad., 128. Vinayak v. Govind, 25 Bom., 129.



of the concurring reversioners to re-open and to question. On this subject I must say I have grave doubts on the concluding remarks of their Lordships on which it appears to me the decision of the Privy Council was based. Their Lordships have said that the appellants who claim through their fathers must be held bound by their consent. I wonder what would have been the result of the case in the opinion of their Lordships if the plaintiffs-appellants were the reversioners of a different class from those who had previously ratified the widow's transactions, and if the said transactions had not amounted to her absolute and complete retirement from the estate. It would therefore appear that these matters might safely be regarded to be still open questions. Then again, against the soundness of the view that the actual reversioner who claims upon the widow's death derives his title from the late reversioner, we are aware of the exact law on the subject which the Madras Court<sup>1</sup> has very fully and ably expressed in the following

No reversioner claims through any prior or foregoing reversioner

words: "When there are several reversioners entitled successively to succeed to an estate held for life by a Hindu widow, no one of such reversioners can be held to claim through or to

derive his title from another reversioner,—even if that other happens to be his father—but each derives his title from the last full owner..... There is no privity of estate between one reversioner and another as such, and, therefore, an act or omission by one reversioner cannot bind another reversioner who does not claim through him."

The widow's transfers in the recent Privy Council case cited in the foregoing paragraph, whether we look at them in the light of surrenders of interest or alienations of estate, were all effected for consideration. In fact they were sales by the widow in favour of her son-in-law for price received. It appears from the report of the case that their Lordships viewed the transactions as reasonable and fair under the circumstances. In this connection we find the Lordships quoting with approval the observations of Jenkins, C. J. in *I. L. R.*, 25 Bom., 133. It

Reasonableness vs. Legal Necessity of consented transactions.

is curious that the opinion yet prevails in Bombay that an alienation effected by a widow with the consent of the next reversioner must have the support of reasonableness and propriety.

1. *Govinda vs. Thayammal*, 28 Mad., 57 (at pp. 60, 61).

The early Bombay case<sup>1</sup> noticed already is considered in that presidency a leading case in enunciating the propositions now under consideration. The Courts are apt to presume that an alienation by a widow with the consent of all her nearest kindred is reasonable and proper. But a presumption however well-founded is always rebuttable. Moreover it is not so steady and stern a fact like any well-recognized legal necessity. The doctrine of reasonableness lets loose all kinds of equitable or supposed equitable considerations on which opinions must differ. It presents a broader field of thought where two men in search of truth may probably never meet; while the beaten tracks of recognized family and religious needs which come under the category of legal necessities are quite familiar to the lawyers of this country. The Bombay case under notice is an instance of alienation of the widow's estate with the consent of her daughter. The alienation was without any legal necessity. Though in the Presidency of Bombay the daughter after the widow inherits her father's property in absolute interest, yet her consent did not raise any presumption of fairness to make the transaction unimpeachable by another set of reversioners who actually survived the widow. It may be observed that a daughter in Bombay stands on the same footing as a male reversioner elsewhere. But the Courts have admitted a distinction between a daughter, even of Bombay, and a male reversioner. It will be seen in the Bombay case that the consenting daughter died in her mother's life-time and the claimants made out a case of wasteful nature to recover the estate which the mother with the concurrence of her daughter had effected. Here at all events we notice a distinct preference accorded even by the Bombay School to the doctrine of legal necessity as against the presumption of fairness of the transaction. It will be seen that later rulings of the Bombay High Court have followed the same view.

In a case before the High Court of Madras,<sup>2</sup> the facts were the following. A Hindu widow in possession of her deceased husband's zamindari requested a Po-Brahmin, appointed by her late husband, to offer the *pinda* for the benefit of his soul at Gaya. The zamindar had appointed the Brahmin to perform his exequial

Estoppel by attestation of reversioner, and what is his real "Consent."

1. Varjivan vs. Ghelji, 5 Bom., 363.
2. Mahadevi vs. Neelamani, 20 Mad., 269.

rites (Po-Brahminism,—a custom among the Oriya zamindars). This, the Brahmin (plaintiff) did. Seven or eight years after the widow executed in favour of the plaintiff a gift of a village which was attested by her daughters, defendants 1 and 2. In a suit by the plaintiff, one of the contentions was that the defendants were estopped from questioning the validity of the gift for want of consideration and of legal necessity. The learned Judges of the High Court disposed of the plea against the plaintiff, and said :—“As to the estoppel which the Judge has also found in plaintiff's favour, we must again differ from him. We find, on the statements of the appellants, which have not been contradicted, that they put their signatures to the deed as attesting witnesses under pressure. There is no evidence to show that they were aware of the exact terms of the document, or that, in attesting the document, they were doing anything likely to affect their reversionary rights. There is absolutely nothing to indicate that they were willing or intended to part with those rights. Considering that they were *pardanasheen* and young women at the time and that the plaintiff was the confidential manager of the affairs of their mother, under whose protection they were living, it lay on the plaintiff to prove that they acted with full knowledge and with independent advice, but the plaintiff has not even attempted to prove this. In these circumstances, we could not have held the appellants bound by the deed of gift, even had they been the executing parties. In no view can their mere attestation of the document amount to an estoppel in a case such as this, where there has been no alteration of plaintiff's position in consequence of their act. We are, therefore, of opinion that the plaintiff has failed to establish the validity of the gift upon which he sues.” In order to raise a presumption of validity, the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing, and an intelligent intention to consent to such effect.<sup>1</sup>

In a case<sup>2</sup> recently decided by the Privy Council, the judgment of the High Court of Calcutta reported in I. L. R., 31 Cal., 433 was discharged by their Lordships. It has been held that a person dealing with a female heir in possession of the

Champerty. *Pardanasheen*. Full appreciation by. Assignment by reversioner.

1. Shamsundar vs. Achhan Kunwar, 21 All., 71 (p. 80).

2. Bhagwat Dayal vs. Debi Dayal, 35 Cal., 420, P. C.

property of a deceased male, must show not only that the transaction was a genuine one, but that the full drift of it was appreciated by her on its merits. The decision of the case by their Lordships of the Privy Council was an extraordinary one. It has an important bearing on the rights of the reversioners who claim possession of the estate upon the death of the female heir. The reversioner in the case noticed above was not able to prosecute the suits in order to recover the estates from the hands of the improper alienees. There were two alienations which

Separate suit for each  
alienation. Joinder  
thereof in appeal.

the reversioner had to avoid in order to recover the estates. The said estates were worth nearly three lacs of rupees. He felt bound to assign his vested reversionary interest to a speculative purchaser for an extremely inadequate price, namely for Rs. 52,600.

Then again, the price was agreed to be paid by very small instalments as the properties to be litigated for, went on being recovered. The High Court of Calcutta considered the above to be a champertous and an unconscionable transaction. Another curious feature of the case was that the plaintiffs in both the suits were the assignors and the assignee; that is, the reversioners and their assignee joined as co-plaintiffs to sue the alienees from the deceased female heir. The idea that always prevails at the time of instituting speculative actions of this sort is that the court would award the claim to such of the plaintiffs as would be entitled to the relief. The learned Judges of Calcutta did not allow this double game, and dismissed the suits against the reversioners on the ground that they had completely assigned their interests, and against the assignee on the ground that he was a gambler in litigation. The suits were tried as one consolidated appeal before the High Court; and it went on as a single appeal before the Lords of the

Assignment of vested  
reversionary interest.

Privy Council. The Judicial Committee of the Privy Council considered it as a settled question that the doctrine of champerty did not prevail as law in India, and that it was no part of the Court's business to entertain the contention between or among the plaintiffs as regards the equities that might arise out of the transaction of assignment between them. The sole question was held to be to safe-guard the right of the reversioner against the alienations without legal necessity. The

Partial legal necessity,  
equitable refund. Mesne  
profits.

evidence in the case was discussed in detail in the proceedings of the Court below which their Lordships accepted as correct and reasonable.

It was found that very valuable properties had been alienated by the life-holder for inadequate considerations. But portions of the advances were found to have been for legal necessity. To that extent the Privy Council declared the defendants to be entitled to refund together with the usual Court-rate interests of six per cent. The mesne profits were adjudged in favour of the claimants, and they were left to be settled at the time of the execution of the decree. This important decision of the Privy Council re-establishes once more the principles of decisions of early cases in favour of equitable refund adjusted with reference to the *quantum* of legal necessity in cases of grossly improper alienations of properties and of alienations for inadequate prices.

Remembering the broad line of distinction that exists between Calcutta and Bombay, in the matter of reversioner's consent or concurrence to validate and to perpetuate the widow's alienation, it would be seen that even in Bombay, the transfer of property by the widow of her deceased husband's estate, was supported because it had been consented to by the nearest *male* reversioner,—Sister's son, while the sister was alive, and she did not expressly consent<sup>1</sup> to the transaction. According to the view established in the Bombay Presidency, where the leading case on the subject is *Varjivan v. Ghelji*, I. L. R., 5 Bom., 563, which follows its own line of interpretation of the P.C. cases,<sup>2</sup> the consent of the then existing group of reversioners of the apparent line of expectancy is necessary. The principle, however, followed in Bengal is simpler and less complex. The accepted theory in Bengal is that the widow at the time of the consented alienation is considered to vacate her seat of inheritance and that she accelerates the succession<sup>3</sup> to, or the devolution of, her estate. It appears that the Bengal view of surrender or release has been approved by the Allahabad High Court.<sup>3</sup> But in the

Reversioner's consent, equitable estoppel, marriage of sister's son, legal necessity<sup>3</sup>

1. *Vinayak Vittal vs. Govind*, 25 Bom., 129.

2. *The Collector of Muslipatam vs. Cavalry*, 8 M. I. A., 529. *Rajlukhy vs. Gokul*, 13 M. I. A., 223.

3. *Ramphal vs. Tula*, 6 All., 116.

Bombay case, now being considered, the widow's sale, consented to by a remoter reversioner was supported, simply because it was a sale to defray his marriage expenses, and the next reversioner who after the widow's death impugned the transaction was the offspring of that marriage. The consenting reversioner was the widow's husband's sister's son; and though all the three grades of Courts in the Bombay case agreed in the view that the marriage of such a distant kindred was not a legal necessity to have justified the widow's alienation of property yet as the plaintiff owed his very being to that marriage, it was held that he was equitably estopped from impugning the transaction. Ranade, J. recorded a separate judgment in the case. The learned Judge quoted the analogy of a house built with the proceeds of an improper alienation. It was pointed out that no reversioner, near or remote, would be justified to seek the annulment of the alienation while he is in possession and enjoyment of the house.

In the Bombay case quoted above, there was another act of alienation which was successfully impeached by the reversioner. The said alienation was by way of surrender of three fields on the ostensible ground that the surrendering widow was unable to pay the Government assessment. Inability to pay the revenue or the rent demand, to provide for the agricultural arrangements, and the like, is a matter of expediency or compulsion for surrendering fields or holdings. It can hardly be said that such surrender is brought about on the ground of legal necessity. But at the same time it is a point of contention on the part of the defendant, as in the Bombay case, if he can make out a justifying cause on the ground of compulsion or pressure to support the surrender. This point however was not developed, as it could have been, in the Bombay case under consideration. But viewing the transaction in the light of an alienation of property without any consideration, it seems to me that the Bombay case is an authority in favour of the reversioner to seek the usual declaratory or the possessory relief, as the case may be. The best analogy for this view would be found in the provisions of the Central Provinces Rent Act of 1898. Section 36 of that Act lays down a summary procedure by an application to the Revenue Officer. In the provinces

Surrender of holdings.  
Legal necessity: Law of  
C. P. and Berar.

under the administration of the Chief Commissioner at Nagpur, if a Hindoo widow surrenders her tenancy in the manner stated in the Bombay case, the nearest reversioner is not entitled to annul the transaction by instituting a regular civil suit, but he is bound to succeed, subject to the exception embodied in clause (4), section 36 of the Act, on his application to be placed in possession of the holding. The pressure or the compulsion of the widow to make the surrender is, it is apprehended, no ground to defeat the claim of the reversioner. But it is possible to conceive complications in such cases. It appears from the language of the law in section 36 of the Central Provinces Tenancy Act that in respect of the tenancy right of a surrendering Hindoo widow, it is the next reversioner and none else who is entitled to apply to recover possession. It would, therefore, seem to follow that if upon the widow's surrender the landlord were to lease the land to the nearest reversioner, it is not conceivable how the remoter reversioners could in their respective turn successfully claim to be put in possession. This I say not only from the language of the law, as I understand it which now prevails in the Central Provinces and Berar, but I believe this view of the matter deserves ample support from the settled view of the country that an alienation by the widow with the consent of the next reversioner conveys to the alienee an absolute estate.

Three important Privy Council decisions and a decision of the Division Bench of the High Court of Madras<sup>1</sup> have contributed gradually to develop the ideas and to settle the law on the subject of the widow's right to and control over the income, the savings and the investments derived from the corpus of her deceased husband's properties. The parent estate pays its due homage to the doctrine of legal necessity; but the offsprings do not recognize its paramount authority. It is needless to follow the line of the gradual development of thought. The leading authorities on the subject have been quoted above; and their nett result has been very fully stated in the judgment of Mr. Justice B. Ayyanger in the last mentioned decision passed in

Property acquired by widow out of the income of her husband's estate. Reversioner's Legal necessity.

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1. *Isri Dut vs. Hansbutti*, 10 Cal., 324 (P. C.). *Sheolochun vs. Sahib Singh*, 14 Cal., 387 (P. C.). *Saodamini vs. The Administrator General*, 20 Cal., 433 (P. C.). *Akkanna vs. Venkayya*, 25 Mad., 351.

December, 1901. Apparently the presumption has now been shifted. It may now be safely laid down that the learned Judge has fully expressed the correct notion of Hindu law and usage in the matter by stating that "in the case of property inherited from the husband, it is not by reason of her intention, but by reason of the limited nature of a widow's estate under the Hindu Law that she has only a limited power of disposition. But her absolute power of disposition over the income derived from such limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment."

Between the Bengal and the Benares School of technical Mitakshara following there is a point of solid difference of opinion as regards the nature of the estate acquired by a widow or mother while she gets a share at the time of the partition among the coparceners. The Bengal view under the doctrines of Dayabhaga and of the Benares School as interpreted by the High Court of Calcutta goes one way; and that is to declare that the share obtained by a Hindu widow at partition is of the same restricted interest as her estate of inheritance. Thus according to the Bengal view the alienation of such property without legal necessity is of no effect beyond the life-time of the woman. This principle, so far as the Bengal Province is concerned, has, it may be said, been affirmed by the Privy Council.<sup>1</sup> In the second case their Lordships at page 514 of their judgment say: "The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with coparceners, who have an absolute interest in their shares, is put by them in possession. In such a case it may be a question whether her interest does not become absolute; though in a case coming from Lower Bengal the contrary was decided by this committee on an appeal from the Supreme Court of Calcutta." In the provinces governed by the strict interpretation of the Benares law, there were no express decisions on this point up to July, 1901. On the 17th July two rulings<sup>2</sup> were passed by a

Widow and Mother.  
Partition with coparce-  
ners. Nature of estate;  
Legal necessity. Dis-  
crepant views.

1. Hemangini v. Kedar, 16 Cal., 758. Bhagwandeem v. Myana, 11 M. I. A., 487.

2. Chhidu v. Nambat, 24 All., 67. Shripal v. Surajbali, 24 All., 82.



Division Bench of the Allahabad High Court laying down, that according to the Mitakshara law, the share which the mother in a joint Hindu family obtains on partition, after the death of the father, of the joint family property between the mother and the sons, becomes the mother's *Stridhan*, which devolves on her death on her own heirs, and not upon the heirs of her husband. According to this view an alienation of such property by the widow shareholder does not stand in need of legal necessity to perpetuate the disposal. The learned Judges of Allahabad felt considerable difficulty to arrive at this conclusion. Banerjee, J. expressed himself with a clear indication of his doubt in the matter. But I would most respectfully submit that if the learned Judges of the Allahabad High Court did not find their hands tied by previous decisions of the Court, it was very desirable, for the sake of uniformity and consistency, that the interpretation of the *Mitakshara* by some of the very eminent Judges of the High Court of Calcutta should have been followed. The Calcutta decisions were quoted and considered at length in the Allahabad cases just noticed. I fail to understand why the extreme and technical reading of Vijnaneshvara's text was preferred to justify for the first time a departure from the settled view of the High Court of Calcutta on the same subject. There can be no doubt that the allotment of share to the mother or widow is a provision for her maintenance. Such an allotment is, ordinarily speaking, never intended to endure beyond the life of the grantee. In other words, it creates only a life-interest. Legal necessity in such cases has undoubtedly a voice in the disposal of the property thus allotted. While considering an analogous subject the High Court of Madras has expressed thus<sup>1</sup> : "As to *Sorolah Dossee v. Bhoobun Mohun Neoghy*<sup>2</sup> and *Beni Parshad v. Puranchand*<sup>3</sup> which relate to the share taken by a mother in a partition between the sons and which were also relied on for the defendants, they are in conflict with *Chhiddu v. Naubat*<sup>4</sup> dealing with the same question. Considering that the right of a mother to a share in a partition between the sons, is not enforced in this Presidency, the question whether the view of the

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1. *Subramanian v. Aruna*, 28 Mad., 1(8).

2. 1. L. R., 15 Cal., 292.

3. 1. L. R., 23 Cal., 262.

4. 1. L. R., 24 All., 67.

Calcutta High Court or the Allahabad High Court is correct, in so far as this Court is concerned, is of no practical importance. Nevertheless, it is to be observed that the decision in the Allahabad case does not rest on the general Mitakshara definition of *Stridhanam* but upon a specific text occurring in an earlier part of the work—a text not referred to and considered in the later Calcutta case which was governed by the Benares Law.”

The above quoted Madras decision is an authority for the proposition that when a Hindu widow in the enjoyment of the current income of her husband's estate or receiving a grant of money for her maintenance makes purchases with the savings or the surpluses, her power of disposal is not restricted by legal necessity. With reference to the decision of the same High Court reported in I. L. R., 25 Mad., 351, it appears, there is a slight divergence of opinion in respect of the presumption that would arise as to whether the subsequent purchases by the widow should be considered as intended by her to become chips of the same block or to remain at her sole and absolute disposal. The later decision of Madras appears to lay down that no presumption of the restricted nature of the estate would ordinarily arise. But the decision is confined to the case of the widow's purchasing estate out of the proceeds of her separate maintenance grant.

Though it is seldom the case, yet it is a very prudent arrangement, if the nearest kinsmen of her husband fetter the hands of the widow in possession of her husband's estate by a *Sulehnama* restraining her from acts of improper alienations to the injury of the reversionary rights. It has been held that such a provision is not repugnant to the principles underlying sections 10 and 15 of the Transfer of Property Act.<sup>1</sup> Such an arrangement may be very convenient and beneficial to all the parties concerned especially when the widow has a tolerably large estate in her possession. But for the purposes of soundness and efficacy of the arrangement it seems essential that the arrangement should provide

Widow's purchases,  
Absolute right.

Reversioners and widows tied by agreement.  
Legal necessities.

Sections 10 and 15,  
Act IV. of 1882.

1. Kuldip v. Khetrani, 25 Cal. 869.

for all the ordinary as well as for the possible and extraordinary legal necessities of the widow. An absolute and unqualified restraint is, I fear, meant to be broken. In the case cited, alienation, *inter alia*, by way of lease was provided against unless it was effected with the consent of her husband's kinsmen who were the other parties to the agreement. The lease by the widow overriding the condition was set aside at the instance of the reversioner. It is very doubtful whether the plaintiffs in the Calcutta case just cited are, in the strict sense of the term, reversioners to the estate of the widow. The facts reported in the ruling show that the plaintiffs had acquired the interest of Udit Narain Sing, the deceased husband of the widow, by right of survivorship. They were therefore the absolute owners of the estate a portion of which was the subject of lease by the widow Khetrani. The said lease was in defiance of an expressed provision in the *Ekrarnamah* against the widow's alienation without the consent of the plaintiffs. The estate that was granted to the widow represented the interest which her deceased husband had in the joint family property. The grant was made as a provision for a separate maintenance. Such an estate could very legitimately be fettered by clogging conditions against her independent acts of alienations. It is of course clear that such conditions do not offend against sections 10 and 15 of Act IV of 1882.

It is impossible to pass over the aforesaid ruling of the Calcutta High Court without comments. The report of the case is unfortunately short ; and we are altogether left in the dark as regards the points in the case for which it was remanded for fresh trial on its merits. Could we not conceive that the defendant's lessees and the widow Khetrani had raised a joint defence in addition to the plea that the restraining clause was legally null and void to the effect that her lease in favour of the indigo concern was effected under the pressure of legal necessity, and that the transaction was perfectly consistent with the purposes of maintenance for which the estate was left to the widow's charge ? It may be that the case was remitted for an enquiry into this point among others. Because it may be possible that though the decision of the first Court was erroneous on the preliminary ground of law, it could be

Comments on I. L. R.,  
25 Cal., 869.

supported on the ground of legal necessity involved in the aforesaid pleadings. The case before us is perfectly distinguishable on the ground that it was the plaintiff's property which was allotted to the widow for her maintenance. But where a widow gets her husband's estate by right of inheritance, it is difficult to understand how by a fettering covenant of the nature as in the case cited, the reversioner can seek the present cancellation of her act of alienation, and if the said alienation be founded on legal necessity how the reversioner can possibly avoid it. The head note to the aforesaid ruling of the Calcutta High Court is somewhat misleading. It is intelligible only when read with the facts of the case. It was wrong to have treated the estate in the hand of the widow as the widow's estate and to have regarded the plaintiffs as reversioners.

It has been already seen in a former chapter of this book that a gift *inter vivos* or a bequest by a Hindu lady of her property is always without any legal necessity. Such transactions, with rare exceptions are avoidable by the reversioners. Those exceptions are in the nature of pious gifts and charities to a reasonable extent of the property, which are intended to conduce to the spiritual welfare of the deceased male owner.

We have seen instances of many Indian cases of wills executed by Hindu widows in possession of their deceased husbands' estates in favour of their own relations. In a case of the Province of Oudh<sup>1</sup> the widow was possessed of a considerable Zamindari estate. In that province, as in most parts of India, temporary settlements of landed estates by the government take place. The last settlement was effected in favour of the widow. Such settlement, ordinarily, induces a belief in the mind of the female heir in possession of the property, an unfounded belief that the grant in her favour is in absolute interest. I have shown already that the Revenue Law in the C. P. and Berar has distinctly provided that such grant at the time of settlement means the assertion in favour of the widow of an interest of widow's estate. But in the case just cited, the widow led obviously by the aforesaid belief, executed a will in favour

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<sup>1</sup> Jaipal vs. Indra Bahadur, 26 All., 238, P. C.

of her sister's son. Her husband's kindred as next reversioner assailed the transaction by a declaratory suit and sought a decree to the effect that the will is null and void upon the widow's death. The Courts of India, in the exercise of their right of discretion, awarded the declaratory relief in favour of the plaintiff. The learned Judicial Commissioner of Oudh fully explained the reasons why a prompt action by the reversioner in such a case is advisable and proper and why the Court's discretion should not ordinarily be refused. The arguments of the learned Judge were that the transaction was fresh, that the available evidence was readily forthcoming and that there should arise no presumption in favour of the prospective alienation by delay contemporaneous with the life of the Hindu lady. But the argument against the institution of such a kind of suit which weighs against the exercise of discretion arises out of the fact that the alienation is prospective and far too remote for the prospective heir to agitate the matter before the Court. Because it may be perfectly possible that the widow may revoke the will in her life-time and the claimant may not survive to be entitled to the estate. Apparently this argument weighed in the minds of their Lordships of the Privy Council; and their Lordships while confirming the concurrent decrees of the Courts below remarked as follows with reference to the institution and trial of cases of this nature: "They are not prepared to concur in all the reasoning of the learned Judge in the present case. And if they had been sitting as a Court of first instance they would have felt no little hesitation before making the decree that has been made." Another important matter that frequently crops up before the Courts is worthy of serious considera-

Widow's debt.

Representative action.

Personal remedy

Legal necessity.

tion. Mayne in his *Hindu Law and Usage* (7th Edition) gives a fair commentary on the legal views on the subject of widow's debts incurred by her in her life-time. The

learned author has fully explained the possibility of two kinds of actions in such cases. If the widow incurs a personal liability for her personal purpose, the creditor has his remedy against her and her estate terminable on her death. But if the debt incurred by her be one of legal necessity and therefore by its nature binding on the property, it has been rightly suggested that the creditor can succeed

to recover his money by so framing his action, impleading all the necessary parties, as to give to them notice as it were that the lender wishes to recover his money from the estate. It is needless to recite the numerous authorities which have been quoted by the learned author in para. 641 of his valuable work. I have elsewhere discussed this subject at length. It is sufficient here to state that if the creditor is imprudent enough to secure barely a personal decree against the widow on foot of a personal debt incurred by her, will such a decree entitle the creditor to recover his money from the estate of her deceased husband? In a case decided by the High Court of Allahabad<sup>1</sup> the aforesaid question may be considered to have been answered in the negative. But a decision of the Full Bench of Bombay<sup>2</sup> has dissented from the view of the Allahabad High Court, and has laid down, I think, the correct principle on the subject. The learned Hindu Law jurist of the Calcutta High Court, Babu Golapchandra Sarkar (Sastri) has treated this subject at some length in the Second Edition of his valuable book on Hindu Law at pages 405—406. The Allahabad Court has laid too much stress on certain wrong deductions made by Mr. Mayne in para. 641 of the Seventh Edition of his book on Hindu Law. The

Mayne, 7th Edition,  
para. 641. I. L. R., 19  
All., 300 and I. L. R., 30  
All., 394, doubted.

authorities cited by the learned author do not go the length of laying down, in a hard and fast manner, the rule of law that the reversioner is not bound to pay the debt incurred by the deceased widow even though the said debt might have been contracted for legal necessity, and even though for such debt no charge on the estate was created by her. The leading Calcutta cases and the Full Bench decision of Bombay referred to above have not been quoted by Mr. Mayne. I fail to understand what could possibly prevent the auction purchaser in the recent Allahabad case from pleading his absolute title to the property purchased at auction by reason of the legal necessity of the loan which was found as a fact by the Allahabad Court. I never knew before that there could be any difference in principle between the voluntary aliena-

1. *Kallu vs. Faiyaz Ali Khan*, 30 All., 394. See also *Dhiraj vs. Mangu Ram*, 19 All., 300.

2. *Sakrabhai vs. Magan Lal*, 26 Bom., 206.

tion made by the widow and the legal alienation brought about by the execution of decree.

I have already shown in this chapter that some of the Bombay cases have not given due effect to the rule of law prevailing in that Presidency, where the doctrine of *Mayukha* has the more paramount sway than that of *Mitakshara*, that the daughter's consent to an alienation by her widow-mother should have the same effect as the transfer by the widow with the assent of the direct male reversioner elsewhere. Because the daughter in the Bombay Presidency inherits, like the male reversioner in the rest of India, an absolute interest in the property after the widow's death. Mr. Justice Doss in a recent Calcutta Case<sup>1</sup> has cited the authority of some of the Bombay decisions in support of his view that if the *kabala* or the conveyance by a Hindu widow be assented to by her daughters the transfer does not create, in favour of the alienee, an absolute estate, if there be no legal necessity for the alienation. It was not necessary for the learned High Court Judges to invoke the assistance of the Bombay Court in support of their decision which otherwise is undoubtedly correct on the authority of the leading Privy Council decisions on the subject. These have also been quoted in the recent Calcutta case. According to the doctrines of Hindu Law prevailing in the *Dayabhaga* school, the daughter's son has a preferential right to the childless widow-daughter of a deceased Hindu. Hence it is that we find that in the case under notice the daughter's son, brushing aside and ignoring the existence of a widow and childless sister of his mother, instituted the suit for the recovery of land annulling the improper alienation by his grand-mother which, it was alleged, had the assent of her daughters. It was found by the Courts below that there was no legal necessity for the alienation. But there was no finding in the lower Court's decisions that the daughters did actually assent, yet the learned Judges proceeded to decide the case in Second Appeal on the theory that the transaction had the consent of the daughters. But in as much as it was positively found, as a question of fact, that there was really no legal necessity for the alienation in question, the Calcutta Court refused to admit the theory of

Consent of daughter as reversioner. Legal necessity. Bengal and Bombay view.

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1. *Bepin v. Durga*, 35 Cal., 1086.

presumption that the consent of the daughter meant and implied that the transaction was reasonable and proper. It should be always borne in mind that presumption is only a rebuttable presumption. It must pale before the positive finding of fact. Where such a finding exists that an alienation is a reckless waste or improper for want of legal necessity, no presumption of the kind, as was attempted to be raised in the case under consideration, should lend any weight to justify the transaction. This leaves the broader question untouched; namely, that where a conveyance has been assented to, by the direct male reversioner for the time being, the vendee acquires an absolute interest, not by reason of any presumption or of legal necessity, but because it is regarded in the light of surrender or release by the widow and the reversioner jointly of their whole interest, vested and contingent, existing over the estate.

The decision of Batchelor, J.<sup>1</sup> in a recent case of the Bombay High Court is one of permanent lease of land

Necessity=real pressure from without. Permanent alienation of land.

granted by the widow with a view to reduce it to plough and apparently to derive some income from it. The lease was set aside at the instance of the adopted son on the ground, as far as the report goes, that a Hindu widow is not entitled to embark on a speculative transaction to develop or improve the estate. This, I am afraid, is too much to say. A prudent manager of property in order to enhance its value ought to improve it, and cannot be charged with mismanagement so as to entitle the next taker to question it or to undo his act. In this case, the learned Judges, awarded in favour of the lessee the necessary costs of improvements which he had incurred to resuscitate the land. We have got it in the facts of the case that the land was a barren waste and it comprised rocky soil. It is altogether contrary to the notions that prevail on the subject that an arrangement of lease to improve such land and to derive an income therefrom should rather redound to the credit of the managing Hindu lady than the reverse. Batchelor, J. has quoted with approval certain remarks of Mitter, J. in an early F. B. decision of the Calcutta High Court.<sup>1</sup> Neither the

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1. Ganapat v. Subbi, 32 Bom., 577.



said remarks nor the decision itself justify the view of the Bombay Court as regards the point on which the decision of the latter Court is based. It would have been perhaps more intelligible if the *ratio decidendi* were grounded on the fact of permanent alienation by lease. This appears at the head-note but not in the body of the judgment.

We have seen it elsewhere that in certain parts of the C. P. it is the rule of law in tenancy cases of agricultural lands that lease creates *ipso facto* permanent tenure. Barring this condition of local law it would not, I am afraid, be right to justify the creation of a permanent tenancy by a Hindu widow of her deceased husband's estate.

It has been abundantly shown in the foregoing pages that the conveyance accepted or assented to by an heir-expectant ordinarily creates full rights. In Bombay, daughter, sister and other *Bhinna gotra Sapinda* female heirs have an absolute estate on succession.<sup>1</sup> In his elaborate judgment Westropp, C. J. has given a useful historical review of the traditional law on the subject of inheritance by the female heirs, and he has declared it to be the settled view of that Presidency that females who inherit *otherwise than by marriage*, that is, succeed by reason of their birth in the family, acquire, in the estate thus inherited, an absolute interest. But the Bombay Courts have not yet held that an alienation by a widow assented to by the daughter or by any other female heir of the description stated above creates an absolute estate. In the case just cited it has, however, been pointed out that a female heir of the class mentioned above is entitled to alienate her estate without any reference to legal necessity. This question has been fully threshed out, and the law of the Western Presidency has been clearly discussed and laid down in a Full Bench decision of Bombay<sup>2</sup> delivered by Sir Raymond West. The learned Judge having exhaustively considered the texts, the accepted usage in the Presidency, and the case law on the subject up to the end of 1886, concluded that, inspite of the

1. Hurry Mohan v. Gonesh, 10 Cal., 823 (829) F. B.

2. Tuljara v. Mathura, 5 Bom., 662.

3. Bhagirathibai v. Kahnuiji, 11 Bom., 285. West and Bühler, 3rd Ed., pp. 105, 106.

differences in other parts of the country, the daughter and the sister enjoyed an absolute estate of inheritance in Bombay, where, it was pointed out, the general consensus of views was the same in respect of widow's rights; but gradually the Bombay Courts have adopted a uniformity of views with respect to widow, mother and *Sagotra* females. It would, therefore, follow from the above that the first point for consideration is, to enquire into the nature of the estate acquired by the female against whose act the doctrine of legal necessity is sought to be applied. The absolute estate acquired by inheritance, gift, etc., evidenced by intention to create full rights in case of wife, mother, and other *Sagotra* females, and by ordinary gifts etc. to daughter, sister, or the like, where such intention is presumed, and the absolute estate created by partition which follows the legal incidence of gift are not subject to the restrictions of legal necessity.<sup>1</sup> It must, however, be admitted that the share allotted to wife, mother, etc., is always a restricted estate subservient to the rules of legal necessity,<sup>2</sup> unless the terms of the transaction, under which the share is allotted, indicate a contrary intention.

\* We would conclude this chapter with a brief account of the current views of the Provinces called the Central Provinces and Berar. We will take up the question of some of those leading cases decided by the Judicial Commissioner at Nagpur which are apparently governed by the Bombay School of Hindu Law. These Provinces have been and are in course of being settled by a large influx of population of the Bombay Presidency. We will, first of all, take up the position that the immigrants from the Bombay districts should always be regarded, until the contrary is established by evidence, as carrying their own law of inheritance and of succession. Therefore it must be conceded that in respect of the settlers from the Bombay Presidency, the case-

1. *Bhagirathibai v. Kahnajirav*, 11 Bom., 285. *Seth Mulchand v. Bai Mancha*, 7 Bom., 491. *Wand B*, 806; *Punchoo Money v. Triolucko*, 10 Cal., 342; *Indor v. Rani Janki*, L. R., 5. I. A., 1; *Doulat Modi v. Nandlal*, 9 C. P. L. R., 95; *Nunnumea v. Krishnaswami*, 14 Mad., 274; *Ramsami v. Papayya*, 16 Mad., 466.

2. *Jugmohan v. Sarodamoyee*, 3 Cal., 149.

3. *Bolya Chand v. Khettur*, 11 B. L. R., 459; *Rampershad v. Chimaram*, 1 N. W. P., 10.

law of the Central Provinces and Berar, regarding alienations by the widow, with the consent of her husband's daughter or sister, should conform to the views which now prevail in the Bombay Presidency. I am not at all sure that the Bombay views are quite uniform and consistent in this respect. Mr. Mayne, in the Seventh Edition of his book on Hindu Law and Usage, has given a clear idea of what the Bombay Courts have now laid down.<sup>1</sup> There has never been even in the Bombay Presidency any divergence of opinion in respect of the absolute right which daughters and sisters acquire by inheritance from their fathers and brothers, respectively. We are not at all concerned with the question of succession in this book; and we do not care whether the inherited estate of the daughter or of the sister is *Stridhan* 'proper' or 'improper,' that is to say, whether such inherited estate would descend in the first instance to her daughter and the like or to her son and the like. What we are chiefly concerned to discuss is the logical and the legal effect of her (daughter's or sister's) consent to an alienation effected by a Hindu widow or a Hindu mother without legal necessity. From the category of 'consent' we must of course exclude collusion, connivance and the like. Unequivocal and explicit desire to give effect to the widow's alienation with full appreciation of what the widow is about to do, is the matter now under consideration.

In Judicial Commissioner's Select Case No. 3 $\frac{1}{2}$ , decided in February, 1883,<sup>2</sup> the parties had originally migrated from Poona. The mother, inheriting from her son, gifted the estate to her daughter, that is, the sister of the last male owner. Being a gift, the alienation was without any legal necessity. The deceased's father's brother claimed as the reversioner, and sought the usual declaration of the invalidity of the gift beyond the widow's lifetime. The weight of the Bombay authorities was relied on against the claim, urging in the first instance that sister, the donee, was the nearer presumptive heir, and that, in the second place, she being entitled to the full ownership, according to the Bombay view, the gift should be regarded as an acceleration of full ownership. Some of the cases decided on the subject were quoted before the Judicial

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1. Paras. 618 and 619.

2. Balajee v. Musth Mania.

Commissioner. What the learned Judge did was, to set up a contrast between the respective weight of authority of the *Mitakshara* and of the *Mayukha*, and he came to the conclusion that the sister, the donee, was no heir at all, and that the plaintiff was then the nearest reversioner. The declaration sought was granted to the plaintiff. We doubt very much if this is a sound ruling. Apparently the decision of the Bombay High Court, reported in Vol. V, considered above, was not brought to the notice of the learned Judicial Commissioner. It may be correct so far that it is the standing view of the Bombay Courts that even if the consenting female reversioner of the *Bhinna gotra Sapinda* class,—a daughter or a sister—were a party to the unauthorized alienation by the widow,—an alienation against legal necessity and propriety,—the remoter male reversioner would not be debarred from suing solely on the ground that the consenting female was the heir, expectant of full ownership. The decision of the case in that way would have been consistent with the view accepted throughout the country. But it was, I apprehend, not quite correct to say that with reference to the parties before the Court,—the emigrating Maharatta Brahmin family, the sister was not the next heir. In the face of the standing Bombay view of the last quarter of a century, this view of the Judicial Commissioner was an *obiter*. In another case<sup>1</sup>, the Judicial Commissioner at Nagpur has held that the share which is received by the mother at the time of partition, ranked as the widow's estate, subject to the restrictions of legal necessities. The conclusion, therefore, is that in the Provinces governed by the principles of the Bombay School, the consent of the female expectant-heir, though immediate and with prospect of full ownership, does not give rise to the doctrine of acceleration; and the next male reversioner is entitled to impugn an act of alienation by the widow to, or with the consent of, the next such female heir.

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1. *Moti v. Kalyan*, Select Case No. 4.

## CHAPTER VII.



### Joint Hindu Family: Father and Son.

Attention is next invited to the consideration of the coparcenary rights. Joint property of all kinds, acquired or ancestral, or a combination of both, may constitute the coparcenary estate ; and the father, the brothers, sons and other relations may constitute the coparcenary class. Estate is held in coparcenary so long as no partition or *batuara* takes place among the members. To enable us to discuss the subject of legal necessity under this head, it is necessary to understand the general outlines of the law of coparcenary as observed in the various schools of Hindu Law, and then their bearing on the doctrine of legal necessity and its application in a coparcenary will be comparatively easy to understand.

As regards the membership of a coparcenary, the rule observed in Bengal is radically different in many respects from that prevailing in the rest of India. On the death of a male member in Bengal, leaving no male issue down to the third generation, a female heir

Women coparceners in Bengal.

of his, — widow, daughter, mother or even the paternal grandmother, — gets a share in the joint estate. She becomes a coparcener to all in-

tents and purposes, with all the rights of the other male parceners. She has a voice in the management and she can demand a partition. Her powers, of course, are sub-

Distinction between the Dayabhaga and the Mitakshara School

ject to the ordinary restrictions ; yet, so long as she lives, hardly any distinction can be drawn between such a female heir and her male coparceners. The rule of the Mitakshara School is entirely different in this respect. It does not recognize representation of a deceased parcener by a female nor does it recognize survival of the deceased member's rights in the aggregate ownership after his death. There is no such thing as succession in aggregate ownership, the law is regulated by the principle of survivorship, the most cardinal view of which is the lapsing of the interest after the parcener's death. There is a

constant fluctuation, so to speak, of the separable ownership in a Mitakshara joint estate occasioned by the birth or the death of any member. The most distinctive feature which should be very carefully borne in mind between the Dayabhaga and the Mitakshara Schools is this: that in the Dayabhaga School the interests are *several* and *fractional* for the different members in the family, whereas such an idea is entirely absent in a Mitakshara family where the interest of *each* member is one and the same, and the ownership is joint and common. "Ordinarily," as pointed out by the Madras High Court,<sup>1</sup> "under Hindu Law, the relation of coparcenary, of which the right of survivorship is an incident, is only possible between descendants of a common paternal ancestor." Strangers also, may, by adoption, affiliation, reunion, &c. enter the system and become members of the coparcenary. In one sense, females also may among themselves constitute a kind of coparcenary, the typical illustrations of which are the cowidows conjointly succeeding to an estate.

In a joint family the question of alienation by any member with legal necessity only arises in reference to the management of the joint

Conflict of view as to a parcener's disposal of his own interest.

estate. In that view, the alienation by a parcener of his share or any part of the estate for any necessity of his own or without any necessity at all does not fall within the purview of the present treatise. It is therefore needless for us to enter upon and discuss in detail the obvious conflict of views that now exists in India as regards the power of a coparcener to dispose of his own interest in the estate for value received. The Bengal and the Allahabad Courts have ranged in one direction and the Courts in Bombay and Madras, and in their train, those of the Central Provinces, in the opposite direction. Under the head of legal necessity, which does not deal with the coparcener's interest as such, but embraces a wider field and relates to the whole or an integral portion of the whole estate, all Courts are agreed as to the general principles, and we proceed to consider them in some detail.

The first point that appears at the threshold of the question is to determine who is the manager. Sir Henry

Manager defined.

Maine defines the manager in the following way, as quoted by Mayne in his Hindu Law and Usage in para 206

1. Malla Reddi *vs.* Padmamama, 17 Mad., 48 (p. 49).

(5th Edition). The patriarchal family is "a group of natural or adoptive descendants held together by subjection to the\* eldest living ascendant, father, grandfather, or great-grandfather. Whatever be the formal prescription of the law, the head of such a group is always in practice despotic; he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution."<sup>1</sup> The theoretical Patriarchal Family assumes another name in practice when the father or the common supreme ancestor dies, and it is then designated an ordinary Joint Family. In either state there is a head or a manager; or the management may, by implication or tacit consent, be assumed by any member in the family. There is no rule or law that a particular relation or a particular class of members should invariably have the management of the estate.

This is a matter of simple and ordinary experience in an Indian household. The earliest clue to this cosmopolitan view has been derived from a text of Narada,—a text in a *sloka* which has been cited and relied on by the five leading schools of Hindu Law;—that is, by the Mitakshara and the commentaries of Viramitrodaya of the Benares School, by the Dayabhaga of Bengal, by the Vivida Chintamani of Mithila, by the Smriti Chandrika of Madras, and by the Vyavahara Mayukha of Maharashtra. We need not quote the text of the *sloka*, but its drift is, that when the family is an undivided one, there cannot be any gift or sale between the coparceners, one cannot be a

Manager no fixed relationship. witness for another. The Hindu jurists inferred separation of interests if one parcener gifted and another received or one parcener witnessed another's transaction. Hence it followed, from the original conception of the text, that between the joint corporate body on one hand and the outside world on the other, the former is a unit represented by one person whom we now, in colloquial parlance or legal phraseology, call the *karta* or the manager of the family. The father, next the eldest brother, then the next, and in this way, the eldest male coparcener, or a superior relation, is generally the recognized head and the manager; but by mutual consent or tacit understanding, by delegation, or in consequence of superior capacity for work, any junior member, the son or the younger brother may be invested with or may wield the powers and

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1. Maine's Ancient Law, 133.

the functions of a manager. The management of the family affairs by the natural head is the rule, and any other arrangement is the exception. Under the usual or the normal condition of things with respect to particular transactions based on considerations of family necessity, a certain amount of presumption is carried, though the actual legal necessity, justifying the passing of the entire estate, has always to be proved. But the alienor and the alienee, under the ordinary rule of management, occupy a sort of vantage ground commanding some confidence which would induce one to accept and to act upon evidence by no means so strong as would be demanded in cases of transactions effected by any junior member of the family affecting joint property.

Bearing in mind the fundamental principles of law as regards the interest of coparceners in the joint estate under the various schools of

Earlier conflicting rulings based on the theory of vested interest from birth.

Hindu Law, remembering further the incidence of ancestral estate and the rule of vested right therein from birth which recognizes no distinction of age or relationship,—oldest by birth, the youngest, the father, the son, and so forth,—we find a series of rulings of High Courts which are a running commentary on the texts, relying sometimes on one passage and sometimes on another. There have been some decisions of the High Court of Calcutta which are plain deductions from the text-law and which annulled, partially or wholly, alienations by the father of a joint or ancestral estate at the instance of the son because, forsooth, there was no legal necessity or benefit to the family to support the transaction. Whether on the analogy of *Giridharilal's* case reported in 22 W. R., 56, those earlier rulings can be followed as good law, is another question. It seems clear that if some of these decisions of the Calcutta High Court had been of a later date under the light and the lead of the Privy Council decision above referred to, it may be doubted whether the alienations by the father in the majority of those earlier decisions would have been set aside at the instance of the sons. We proceed to illustrate our meaning farther.

In the first place we will premise by observing that in Bengal a peculiar system prevails in regarding, even in ancestral property, the ownership and the control of the father as almost absolute, but the ownership of the sons therein is not recognized before partition. This peculiar view does not obtain under the Mitakshara law



prevailing in the rest of India, where, as we have seen before, the original texts and the current of opinion are in the other way, namely, that the sons and the father have an equal vested interest in such

property. • Notwithstanding this difference

in the views of those two schools, there is now practically no difference in practice as regards father's power of alienation of any kind of property independently of the sons. Alienations are, generally speaking, of two classes. *First*, for value ; and *secondly*, for no value, such as by gift, will, &c. In no case has it ever been held that the sons have got any voice or right of interdiction when the father alienated an estate for pressing legal necessity, as for payment of family debts or for its maintenance.<sup>1</sup> In *Bisambhar vs. Sudaseeb*, 1 W. R., 96, the High Court recognized the fact that in such cases the son has no power of interdiction which is, only limited to cases of dissipation and waste. But in a later ruling<sup>2</sup> a fanciful distinction was drawn, between the cases of alienation, if adult sons are living, and the

Adult and minor sons  
equally bound.

cases when the rights of minor sons are being parted with by the father. It has been suggested that if a valid family necessity exists, all the rights including those of the minor sons can be passed, because, they are incapable of consenting ; but if aged sons be living at the time, a father has no right to alienate without consulting them. We call the drawing of this distinction as fanciful by the light of more recent rulings. The matter has now been entirely cleared up by repeated judicial decisions. It has been settled without the least possible doubt, that once we accept the existence of legal necessity, a manager, to say nothing of a father, is fully entitled to alienate joint property, the necessity will either presume their consent or silence their objection ; and that in the case of a father, even his personal necessity, untainted by fraud or immorality, will validate an alienation against the son of any age and under all circumstances. Therefore it follows, under the principles of rulings as they now stand, that whereas in cases of joint property a purchaser has got to show, in order to uphold the alienation in his favour, that he had made *bona fide*

1. Otherwise of course, if the debt does not exist. *Rama Samayyan v. Vira Sami*, 21 Mad., 222.

2. *Aproop vs. Kandhjee*, 8 C. L. R., 192.

enquiries and satisfied himself about the existence of benefit, (on the principle of *Hanuman Prasad Pande's* case, in 6 Moore I. A., p. 393, —a principle held to apply between minors and guardians as well as between the manager and the other coparceners),<sup>1</sup> an alienee from a father has barely to show that his money was applied to

defray expenses unconnected with vice or  
Father and son. immorality. For instance, if the purchaser

sees that family property has been attached under a decree against the father; if he finds that there are debts payable by the father for bonds or for expenses of litigation in which the father was involved, he is quite justified in advancing money and purchasing the property either at a court-sale or by private transfer.<sup>2</sup> In an early case<sup>3</sup> the Court laid down some stress on the condition, which, it was said, lay on the purchaser to prove the existence of legal necessity to validate an alienation by the father. But in modern times the alienee from the father, as shown above, has been considerably relieved of the burden so that we cannot now implicitly follow the *dicta* of the above quoted rulings to their full extent. Nor can we regard the next case that we quote as good law.<sup>4</sup> It was a case where decrees had been obtained against the grandfather who had confessed judgment, and sales had taken place in execution of those decrees. The High Court held that the purchasers were not protected against the claim of the grandson; there being no other evidence as to the existence of the grandfather's debts except judgments on confession. The alienee would now say that the suit of the grandson must fail if he failed to substantiate that the debts and the decrees thereon were of an immoral character or were a bare fraud or devise to deprive him of the estate.<sup>5</sup>

On the above subject the following observations in a Civil Judicial Circular promulgated by the Judicial Commissioner of the Central Provinces for the guidance of the subordinate Courts may be usefully referred to. "A large number of suits are yearly brought

1. *Jugdai Naraian vs. Lalla Ramprakash*, 2 W. R. 292.

2. *Mustt Bhooran vs. Sahebzadee*, 6 W. R., 149.

3. *Mustt Nourattan vs. Babu Gouree*, 6 W. R., 193 and *Babu Lachmeedhar vs. Ekbali Ali*, 8 W. R., 75.

4. *Brajokishore vs. Horikissen*, 10 W. R., 57: dissented from in 10 W. R., 57.

5. Compare *Diwaker vs. Janardhan* 3 C. P. L. R., 64.

to set aside alienations of immoveable property on the ground that there was no "*legal necessity*" for the sale. It is found that the law on the subject is misunderstood by many of the subordinate Courts. The misunderstanding has spread to the people at large ; and the consequence is, that numberless attempts to disturb the possession of purchasers are made upon speculative grounds which in some cases obtain judicial acceptance until this Court deals with the claims in special appeal. For these reasons it seems proper to make known what is the principle which has been recently followed by this Court. ....

"In ruling No. 207 of the Digest of Civil Rulings published by this Court in 1877, the points to be kept in view when the alienation, sought to be avoided, was made by a father during the minority of a son, were briefly indicated, upon the lines of the Privy Council judgment in the leading case of *Girdhuri Lal vs. Kantulal*, 14 B. L. R., p. 187. The indication seems to have been only partially understood by some judges ; and others have wrongly applied it to cases where the alienation was made by a widow, or by a managing coparcener without the authority of his fellows. The principles upon which those three classes of cases are to be decided are not the same. The question of "*legal necessity*" strictly speaking only arises in respect of alienations by widows, by managing coparceners, or by guardians of minors, in whose case the question may be, whether with a due regard to the provisions of the Mitakshara law and (in the case of coparceners or guardians) of the general law of agency, the circumstances were such as to justify a relaxation of legal restrictions on a widow's control over immoveables, and on a managing coparcener's or guardian's power to dispose of any other share than his own. On the other hand, in the matter of an alienation made by a father during the minority of his son, the question to be considered is now held not to be one of "*legal necessity*" but of the moral propriety of the transaction. The principle which this Court at present follows.....is the same as that adopted by the Bombay High Court, and is set forth in the following passage from the judgment delivered by Mr. Justice Markby in the case of *Adurmani Dayi vs. Chowdri Sib Narain Kur*, I. L. R., 3 Cal., p. 1. 'The true question for consideration is not

Legal necessity in case of father.

whether there was any *legal necessity* for the sale, but whether the sale was to satisfy a debt which if contracted by the father, and left unpaid by him, the son would, under the Hindu Law, be under an obligation to discharge. If it was to satisfy such a debt that the property was sold, then, I think, according to the Privy Council decision (in the case of *Girdhari Lal v. Kantu Lal*) the sale is valid. I think that decision also clearly shows that it is only in respect of debts contracted for an immoral purpose that the son can say that, under the Hindu Law he is not liable.”

The misunderstanding discussed above prevailed not only in the Districts of the Central Provinces of India, necessitating a clear and forcible expression in the form of a general Circular from the High Court of the Province, but the Courts in the other parts of India at times failed to realize the distinction between the father and the other coparceners, and applied the principle uniformly that no one could be permitted to deal with or dispose of other's estate unless he had the right to do so and he actually did so on the ground of strict legal necessity. The Lords of the Privy Council more than once noticed the error, and were compelled to re-affirm their view in several decisions subsequent to *Girdharilal's* case,<sup>1</sup> and pointed out the distinction between the two classes of cases. They observed “the rights of the coparceners in undivided Hindu family, governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brothers, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu Law imposes upon sons, and the fact that the father is in all cases naturally and in the case of infant sons necessarily, the manager of the joint estate.”

Prior to the date of the promulgation of the Privy Council judgment in *Girdharilal's* case *i.e.* 12th day of May 1874, the divergent views must now be reconciled or explained by the light of the decision of the highest court of appeal in this country. If we examine the original texts of Hindu Law laid down by the sages and adopted by the several schools prevailing in the Courts, it will be seen that their Lordships of the

Early rulings must be interpreted subject to later P. C. decisions.

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1. Suraj Buns Koer's case, 4 Cal., L. R., 226.

Privy Council though *prima facie* following the isolated view of an earlier decision of the Sudder Dewani Adaulat delivered in 1861, have not laid down any revolutionary principle of Hindu Law with reference to the vested interest of parties in ancestral properties. It is no doubt true that in the Courts of British India in those early days, the learned Pandits of Bengal were used to be invited to assist the Judges in the interpretation of the obscure texts of Hindu Law. The eminent Judges of the Privy Council had in those days to struggle hard to reconcile conflicting views of decisions passed in India. The rule of law laid down in *Girdhari v. Kantoo Lal's* case is by no means of an extreme or revolutionary nature. The orthodox Hindu mind of this country was in those days, I may safely say, perfectly prepared to uphold the dignity of the Hindu father in respect of his alienations of ancestral property in which his sons had their vested interests by birth. The veneration with which the father and his position were regarded by the Hindu nation in pursuance with the views contained in the archaic texts of Hindu Law rendered the decision of the Privy Council as implicitly acceptable to the people. Since the time of that celebrated judgment nearly half a century has passed and yet the decision in *Girdhari Lal's* case is the beacon light in cases of controversy between the fathers and their sons in respect of the debts of, and the alienations of property by, the former. In recent times, however, British institutions, education on English lines have had potent influence of inducing free thoughts that are not quite consistent with the strict orthodox views of the early texts by no means either obsolete or inconsistent with the sound principles of justice, equity and good conscience. Later on in this Chapter, we will notice how the struggles against the texts of our Hindu sages are manifesting themselves in the recent decisions of British Courts of this country and we will try, if possible, to reconcile the conflicts as they might apparently exist in the views of Courts in consistency with the memorable decision in *Girdhari Lal's* Case. Take for instance the Madras cases noted in Mayne's Hindu Law in para 284, 4th Edition, and the Privy Council decisions thereon. Compare also the

observations of White, J. in *Bhicknarain v. Janakising*, I. L. R., 2 Cal., 438. This judgment is another illustration to show how the ruling in *Kantoolal's* case was at first attempted by the tribunals in this country to be confined

within as narrow limits as possible. According to White, J. the creditor was bound to show that there was legal necessity as the basis of the father's loans, and the proof by the sons of the immoral nature of the debts was of no consequence.\* Were it otherwise, says the learned Judge, then the "interests in the ancestral immoveable property, which under Mitakshara law, are vested in sons by their birth, are entirely unprotected from the selfish, wasteful, or capricious, acts of the father, except in the single instance of money borrowed by him upon the estate for immoral purposes." In a case<sup>1</sup> before the Full Bench of the Allahabad High Court the question raised was the liability of the grandson of a Hindu mortgagor to interest secured

Grandson and son  
equally bound.

by a mortgage-deed. The interest exceeded the principal and the doctrine of *Danduput* was set up in the first instance. Next a distinction was sought to be drawn between the son's and the grandson's liability on the score of their respective pious obligations. The learned Judges, having considered the texts and the leading cases on the subject, held that the obligation of the son's son is not in any way less than that of the son, and that the stipulated interest is a debt binding as much as the principal. It was found that though the debt incurred by the mortgagor was neither for family necessity nor tainted with immorality, but as it was a personal debt of the ancestor the estate was chargeable for the entire claim. The solitary case of the Bombay High Court<sup>2</sup> limiting the grandson's liability to the principal only and not to interest, independent of assets, was held to be no law for the rest of India, but was inconsistent with the text and the decisions by the Privy Council. It was, however held in effect by the Full Bench that the sons and grandsons of a Hindu debtor are liable to the same extent as the debtor himself, provided they were possessed of sufficient family property or assets of the debtor not otherwise duly applied.

The decision of White J. in I. L. R. 2 Cal., 438 was reviewed by the later decisions<sup>3</sup> of the Calcutta High Court. Though it may be said that in their subsequent decisions the learned Judges of

1. Lachmandas vs. Khunnu Lal 19 All., 26 F. B.

2. Narasinha vs. Krishnarao 2 B. H. C. R. 64.

3. Gunga vs. Sheo-dyal, 5 C. L. R., 224; Damudar vs. Mahoram, 13 C. L. R., 96; Khalilul vs. Gobind, 20 Cal., 328.

Calcutta refused to follow the principle indicated by White J. in the earlier ruling, yet we find in some of the later decisions detailed discussions on the subject of legal necessity in the nature of pressing family purposes which strengthened the justification for the alienation by the father. Family needs, such as daughter's marriage, mother's *sradh*, discharge of previous debts, etc. were considered. But it has been also held that in such cases the Court is not bound to pry closely into the legal necessity of the transaction by the father. Ordinarily, no doubt, the creditor or the alienee would not fail to adduce the rebutting evidence against the son's claim. But even if he fails to do so, the rulings held that the son is bound to make out his own case to undo the effect of his father's transactions in respect of his own interest in the property. In the Calcutta case cited last, the learned Judges have observed that the debts incurred by the father in transactions the character of which is no more than imprudent or unconscientiously imprudent, or unreasonable, are debts to which a pious duty of the son attaches under the *Mitakshara* law. It was entirely a question of opinion whether the heavy litigation expenses which were incurred by the father in the Calcutta case were prudent or unconscientiously imprudent. It would, I submit, be too large an advance upon the recognized principles of this subjects that for loans by the father against the dictates of prudence and of conscience could have any claim upon the piety of the son. The subordinate Judge held that the expenses were reckless and were not expressly intended to cause any benefit to the estate.

In view of the above decisions we are bound to hold that the Courts are unwilling to take upon themselves the decision as to the nature of the liability incurred. The ruling of the Calcutta High Court reported in the 2nd volume cited above is a departure from the settled view.

We need not multiply instances to show the attempted departures. But it will be useful to understand the precise nature of those debts which Hindu law declares to be not binding on the sons, and for which in a *Mitakshara* family during the life-time of the father for an unsecured debt, and even after his death, if the debt

is secured on the estate, only the father's interest will pass. The  
 Immoral debts defined immoral debts have been defined in sloka 48  
 of the second chapter of Yajñabalka thus :—

सुराक्राम द्युत कर्त दण्ड शुल्का वाश्लिष्टकं ।

वृथा दानं तथैवैह पुनो दद्यान् पैठकं ॥

‘The son should not pay such paternal debt as is incurred on account of drink, of lust, of gambling ; nor the balance of a fine or of a toll ; nor like-wise his infructuous gifts.’ In other words, debts incurred by drinking liquor, by reason of infatuation about a woman, that incurred in a game of hazard ; infructuous gifts to a cheat, to a minstrel, a wrestler, or so forth, are in the category of sinful debts. A debt for which no action at law lies is one arising out of an immoral or unlawful bargain. It is not quite within our purpose to give an elaborate list of sinful, illegal, or immoral debts which would exonerate the son and his estate. Between the strict legal necessities on one hand which would justify an ordinary managing coparcener to alienate the interest of his fellows and the unwritten edicts of an ethical code which regulate and classify the debts which the Hindu son is bound to repay, there are various grades and shades of necessities of debts and alienations therefor which will demand adjudication by our Courts of law, equity and good conscience. That the paternal debts are payable is the rule ; and that certain classes of such debts are not payable is the exception. The efficacy of an alienation, therefore, is contingent on the class in which the antecedent debt falls. These being undoubtedly general propositions, there are certain varieties between the extreme cases which deserve attentive consideration. Thus, the more a particular debt or alienation is repugnant to or removed from the principles of the recognised texts, the greater will be the demand for the proof of legal necessity to uphold the father's alienation.

Though it is, ordinarily speaking, clear that the creditor is  
 secure for his loans and obligations incurred  
 by the father in accordance with principles that are well settled, yet, it sometimes  
 happens that the Court of law, equity, and  
 good conscience refuses to recognise the validity and the binding

Fraudulent and unfair  
 dealings of father. Son's  
 liability.



nature of certain kinds of debts and obligations that may be considered as unfair and of unconscionable nature. The *Shastric* texts and the settled principles on the subject have reference always to fair and *bona fide* dealings. But if the facts of a case show that between the father, as vendor of ancestral estate, and the vendee there has been collusion or gross and fraudulent unfairness to the son the transaction is a nullity in *toto*.

It has been held in a case decided by the Judicial Commissioner<sup>1</sup> at Nagpur that if the son makes out a case of the above nature against the father and his assignee, the whole transaction is void ; and even the interest of the father does not pass. The facts of the case show that valuable moveable properties to the extent of Rs. 37000 were sold for Rs. 15000,—the consideration not paid at once, but it was payable by six annual instalments. The father was found to be an imbecile and addicted to intoxication. No sane man could commit such a gross fraud upon the coparceners of vested interests. Similarly, if the father becomes indebted on account of a wrongful act, or if, for such a debt, a decree is passed against him, the son's interest will not be bound. Thus, if a father misappropriates property and is sued in damages, and a decree is passed, it is an immoral debt for which the interest of the son does not go.<sup>2</sup>

In another case,<sup>3</sup> the father was an embecile and subject to epileptic fits, while the son a juvenile, just in age and an ignoramus. Both joined in executing a sale-deed regarding property worth Rs. 6000 or so for Rs. 600. It is true, certain advantages were reserved in the deed, which the Court considered to be of doubtful efficacy. The matter of alienation was impeached as fraudulent, and the Court held that the decision did not rest on the technical rules of pleading, but that the transaction deserved to be annulled on the ground of being an unconscionable bargain, as the parties stood on quite unequal grounds, where one party took an unfair advantage while the other was imposed upon and overreached by cunning artifice or undue influence.

1. *Diwakar vs. Janardhan*, 3 C. P. L. R., 64.
2. *Chandra Sen v. Gangaram*, 2 All., 901.
3. *Sahdeo v. Kondu*, 2 C. P. L. R., 186.

Ordinary presumption of father's dealings. Ordinarily the dealings between a father in a joint Hindu family, and his *bona fide* lenders are, as regards the father's *status*, representative in their character.

The father is the recognized head of the family. He is looked upon in that light not only within the family circle but the outside world deals with him in that belief. He is, moreover, the managing coparcener. Consequently his dealings mean and imply a sort of presumption of legal necessity which benefits the lender by lightening the burden of proof to justify the father's action. The sons, whether major or minor, equally come under the influence of his presumption. The *pater familia*, in all ages and in all countries, has always occupied a vantage ground,—the necessities of the father being recognized as, and admitted to be, the needs of the family. To this the religious instincts of the Hindus having contributed another element, namely, the sacredness of the father's debts, we arrive at the complete reasoning of the case of *Girdharilal v. Kantoolal*. It is no doubt true that the several ingredients which make the sum total of the father's position and raise the presumption, may vary. Some or most of them may be absent in particular instances. To that extent the presumption loses its force, and the Courts of law and of justice find their course more or less beset with difficulties. It should be clearly remembered that the case of *Girdharilal* is not an inviolable dogma or an inveterate creed. It is based on the broad ethical ground, morality, of which a complete definition has not been given either in the original texts or in the case-law. Education and enlightened culture will go on altering the social and the moral tone of the country. Matters of questionable propriety now may in time be set down as rank immorality. All nations and societies on the face of the globe pass through stages of constant transitions : and like everything living, they are susceptible of decay as well as improvement. Then again, our *Shastras* are the proverbial panacea for all kinds of texts. A most inauspicious day or a most calamitous event under one system of astrological calculation receives and is capable of receiving the highest encomiums on the score of considerable potential good under another system. Our ancient law interpreters—the traditional Pandits of our law courts, never lacked in finding appropriate texts for any argument that one could advance. A time there was, when these Pandits were the recognized infallible guides for solving knotty questions of Hindu

law. As a class, they were the most ill-paid officers of Courts, and it is no wonder that their extreme pliability and changefulness of views and their ready adaptation to any kind of theory that may favour a particular party, fixed on them the stigma of unreliability and corruption, and led to their eventual removal from the precincts of Courts. But though the Pandits have disappeared, the conflicting texts and interpretations still exist and will exist for ever in our national and religious code, and evermore the Indian Courts will prevaricate and find special features in cases and other special texts bearing on them to differ from stereotyped *dicta* of the highest Court in this country. •

For example, on the basis of the Mitakshara, chapter I, sec. 1, paras 28 and 29, the High Court of Calcutta<sup>1</sup> drew a distinction between the cases where minor and adult sons are concerned, and the theory of the latter's consent was introduced. Though it was found in the case that the debts were not incurred for immoral purposes, yet the case was remanded for a finding whether the alienation (mortgage) had the consent of the adult son or not. We can easily anticipate the probable result on a negative finding on the issue. It would hardly be necessary to make such an enquiry now.

But the question may very properly and reasonably arise, whether the doctrine of the son's piety and the leading decisions on the point are always the safe and infallible guides in every possible case that may be conceived. Take the example of a family consisting of a father, a minor and a major son. Suppose, as is sometimes the case, the father and his adult son to be the *de facto* managers of the family in the enjoyment of some ancestral property. If the father be a man of wasteful habits, not vicious or immoral, but foolish and a spendthrift; and the son a diligent, thoughtful, and well-behaved person; will the latter, in due deference and submission to the well-known doctrines of the Privy Council decisions, allow the father to sign away the entire estate—piece by piece—simply because the debts are pure and free from the taint of immorality? It is impossible to define precisely all sorts of debts and obligations by the father which may be regarded as not strictly moral. The course of dealings which

Is Giridharilal's case the safe guide in all circumstances?

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1. *Aproop Tewari v. Kandhjie*, 8 C. L. R., 192; 6 Cal., 749.

tends gradually to annihilate the ancestral properties of the family without rendering any benefit to the coparcenary, can in no sense be regarded as justifiable on moral grounds. Will it be reasonable to suppose that to avoid the *Scylla* of the gradual destruction of the estate which, under the strict interpretation of Girdharilal's case, the adult son cannot prevent, he should precipitate into the dangerous *Cheribdis* of an expensive and ruinous partition suit?—Or will it be permissible for the adult son to challenge the acts of improper alienations of an indiscreet father as not strictly warrantable on moral grounds? The code of morality is an unwritten volume of ethical precepts, in which opinions differ; and in all times and at all places the governing rules of societies will exercise potent influence to determine whether the particular acts of the accredited heads of families are justifiable on moral grounds or not. Even up to the present time there exist considerable discrepancies of views of our Courts in respect of the son's right to question the morality of his father's alienation of estate. The ancient Hindu law is full of texts of all sorts. There are obvious conflicts at places. If the father's act is consistent with the principles of one text, not consistent with the habits and customs that might prevail for the time being, is it possible that the son can seek to support his case and find an appropriate aid of some other texts that exist and that bear the obvious marks of a steady purpose to meet the varieties of cases?

In one case,<sup>1</sup> the son was a minor, and the father, in charge of the business, entered into some time-bargains which resulted in heavy losses and liabilities. The father was sued alone, decree was passed, and in execution thereof, the family property was sold. The Allahabad Court upheld the purchaser's claim to the full extent including even the minor's interests, though the minor was not represented in the action. The Lower Appellate Court relied barely on the doctrine of the sacredness of the father's debt and on the piety of the son to discharge them. The Court was greatly influenced by the consideration of the hypothetical case, *i.e.* the reverse of what had actually occurred, namely, that if the transactions described as *time-bargains* in the Report had resulted

Father's time-bargain  
debts.

1. *Phulchand v. Lachmichand*, 4 All., 486.

in profits, the son and the joint estate would have been benefitted in the bargain. But is the doctrine of sacredness and piety applicable to such a case? The learned Subordinate Judge mainly relied on the provisions of the adjective law of procedure, and granted to the son the relief he claimed on the ground that he had not been made a party to the decree and in the execution proceedings which resulted in the sale of the ancestral property. The High Court on appeal reversed this finding on the authority of the rulings of Courts and of Privy Council decisions which have settled the question that when the father is sued in his representative capacity and execution proceedings are taken in that manner, the entire interest in the property is sold at auction. But it is strange that in the case under notice the respondent did not raise the contention that he was entitled to show, having not been a party in the original suit, that the liability incurred, was out of wagering contracts on grain: that in that view the transactions were illegal and immoral; and that the father could not have been his representative in an act of illegality and immorality; or that under no circumstances could the son's interest in the property be chargeable for such a debt. The fact, that a decree had been passed against the father and that the property had been sold in execution, did not prevent the son from reopening the question as to the nature and character of the debt. This point, however, was not developed to any extent before the learned Judges of the High Court, and consequently I am not in a position to state what would have been the decision of the case, if, as a question of fact, it could have been established that the obligation was essentially of an illegal origin.

In a case<sup>1</sup> before a Bench of the Allahabad High Court, the plaintiff claimed a sale decree on a mortgage of certain properties executed by the father. The interest of the minor son in some part of the estate was exonerated from the claim.

Presumption in favour of father's debts, *onus*; general allegations insufficient.

The Courts below having considered the dealings justified the dismissal of the claim *quod* the son's interest on the ground that the father "is an extremely immoral and extravagant man, and that he has wasted property worth lakhs of rupees in a very short time. Therefore the sons and grandsons of such a man should not be held

1. *Kishan Lal v. Garuruddhwaja*, 21 All., 238.

liable for any debt incurred by him." This sort of general reasoning was not held sufficient to support the finding that the debt did not bind the son. The Court held that, if it had been proved that the debt had been contracted for immoral purposes, and that the person who advanced the money was aware of the improper purpose for which it was being borrowed, the son would not have been liable. The connecting link between the loan and its purpose was in this case wanting. The Court observed that "a mere general allegation that the father led an extravagant, immoral, and licentious life, would, even if proved, not be sufficient to relieve the son."

In such a case, though it may be that the minor is represented by the father in the litigation, there is nothing in law to prevent the son to dispute the binding nature of the loan or the alienation effected thereby, either by forcing his entrance into the case as a party, or by disputing the transaction in a separate suit. In either case if the son succeeds in establishing the extremely immoral and dissipating habits of the father resembling what was found in the case under notice before the Allahabad High Court, he should not, I would respectfully submit, have his interest in the ancestral property made to suffer simply because he could not further substantiate the connecting link between the loan and its purpose. The doctrine of connecting link has been laid down in several cases considered in this book. It is no doubt that by itself the

Connecting link between general proof and particular case. principle is sound and unimpeachable but it has an important bearing in relation to

the question of the burden of proof. There have indeed been cases in the shelves of law libraries throughout the country in which the Courts held that the creditor or the alienee from the father of ancestral estate must, in the first instance, show that the debt involved in the matter benefitted the estate before the same could be binding on the family. Then, on the other hand, an epoch of departure from this principle was commenced from the moment that the case of *Girdharilal vs. Kantoolal* was promulgated on the subject by their Lordships of the Privy Council. Thus, the pendulum swung back and a series of rulings of Courts ensued to the effect that the sons must suffer in respect of his father's debts and alienations unless and until the former could show that the purpose of the loan was

of a specified, immoral and illegal nature. Here I would most respectfully ask, is there no middle line between these two extremes? In the case of a profligate and dissipating father whose career is marked by the general taint of immorality and recklessness and who could, as in the Allahabad case under notice, waste ancestral estates worth lacs of rupees within a short period of time, the son has every right to demand that the lender of money must be called upon to prove his *bona fides* as regards his advances, namely, that he had, as a man of ordinary prudence and of business habits, enquired and satisfied himself that he honestly believed the loan to have been for legal necessity or an ostensible purpose of family benefit. This is a matter which is sooner capable of proof than the proof of the reverse on the part of the son to show the connecting link between the loan and its purpose. At all events the equities in such cases, to say nothing of the law, are in favour of shifting the *onus* on the creditor. I venture therefore to think that the learned Judges of the Allahabad High Court should have for the right decision of the case before them, adopted this course in preference to the line that was followed, namely, to dismiss the son's claim, simply, because he was not able, after a considerable lapse of time to show in what way the money was spent by his father.

Thus in a case <sup>1</sup> a decree for damages for theft or misappropriation was passed against the father. Public or private sale for decree or debt. The ancestral property of the family was Nature of debt and son's liability scrutinized. sold and the purchasers took possession. The sons and the other members of the	family sued to recover their interests in the property sold at auction. It was held that there was no binding debt for the decree and for the execution sale. Indeed the basis of the decree was no debt at all. The Court looked beneath the surface of the proceedings and scrutinized the nature of the obligation which gave rise to the decree. The learned Judges of the Calcutta High Court considered that they were not bound by the terms of the sale-certificate which purported to convey the entire interest in
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1. Paremandas v. Bhatta Mahton, 24 Cal., 672.

the property. By their action in a fresh suit the sons and the other members revealed the nature of the debt as of sinful and immoral character. Damage for theft or for misappropriation is not an antecedent debt of the father which has a claim on the piety of the son to discharge. It was held further that the purchaser at auction was not protected by the language of the sale-certificate ; and that he was bound to enquire into the nature of the obligation which resulted in the decree in order to take shelter under the principles of the Privy Council decisions that impose on the sons the liability to pay their father's debts. This case and a decision of the High Court of Madras mark a rational deduction from the decisions of the Privy Council to the effect that there is no pious obligation on the part of the sons to discharge their father's liability arising out of illegal and immoral debts that might have been incurred by the father. In the Madras case the sons gave no evidence whatever. The plaintiffs, while proving the consideration for the mortgage disclosed the nature of the liability, which consisted of misappropriations of Bank's monies by the defendant's father. It is plain that, whether or not, there has been criminal prosecution for the act, yet if the act of misappropriation constitutes the technical offence under the Penal Code the pecuniary liability for such an act does not entail any civil obligation upon the son. In the Calcutta case the learned Judges have gone the length of laying down that upon the son's challenging the nature of the debt the creditor is bound to prove that by reason of the legality of the debt and benefit to the family the sons are liable.

Broadly speaking, there are two fundamental systems of Hindu law in this country : firstly there is the Dayabhaga School, and secondly the principles of law prevailing in the Mitakshara Hindustan. The absolute dominion of the father in Bengal over all kinds of property, and the vested rights of sons in the ancestral estate in the Mitakshara country acted for a long time in direct conflict with each other in producing widely divergent and discrepant series of rulings. Naturally enough, the prevailing thought in Bengal induced, as observed elsewhere, the Sudder Dewani Adalat of Bengal to lay down the hard and fast rule of law

Dayabhaga v. Mitakshara re father's powers.



regarding the moral or rather the legal obligation of the son to pay his father's debts. We have seen also that this view of the matter received the affirmative sanction of their Lordships of the Privy Council in the celebrated case of *Girdharilal vs. Kantoolal*. The obligation which in the spirit and in the language of the texts was only a pious and moral obligation on the part of the son, was raised to the rank of a legal obligation binding on the sons and on their vested interest in property. Yet, can we say that the doctrine so authoritatively laid down by the Privy Council, covers the entire ground of Hindu law throughout the country? Prevarications and departures have been noticed in the rulings of the Mitakshara School, not by way of dissent from the law laid down by their Lordships, but by way of explanation of and deduction from the views of the Privy Council judgment. The equities that arise from the consideration of the legal necessity for the debt began once more to assert their influence. The scope of the moral and the legal nature of the debt was augmented. The case-law before and since the passing of the celebrated *Girdharilal's* case has ever followed the *ratio decidendi* arising under the doctrine of legal necessity and benefit to the family and it is this that we proceed to show below.

In the first place, it must be always borne in mind that the whole of the Dayabhaga country is governed by its own peculiar principles. The early decisions in Bengal quoted in Mayne's Hindu Law (4th Ed.) para 347, show cases in which the late

Father's power absolute in Bengal.

Sudder Court and the Supreme Court in Calcutta recognized the validity of the disposals, by gifts, devises and otherwise, of the entire ancestral estate by the father, subject to the only restriction in favour of sons and others, of provision for their maintenance. "On mature considerations," said the learned Judges of the Sudder Court, "of the points referred to us, we are unanimously of opinion, that the only doctrine that can be held by the Sudder Dewani Adalat, consistently with the decisions of the Court, and the customs and usages of the people, is, that a Hindu, who has sons, can sell, give, or pledge, without their consent, immoveable ancestral property, situated in the Province of Bengal; and that notwithstanding the consent of the sons, he can, by will, prevent

or alter or affect their succession to such property."<sup>1</sup> This is the settled view in Bengal upto the present moment. Compare *Ramkishore v. Bhoobanmayee*, S. D. of 1859, 250. A Bengali father possessed of ancestral estate has rights almost identical with those of a Mitakshara father over his self-acquisitions. The early rulings of the High Court of Calcutta maintained a sharp distinction in the relative rights of a father under the Dayabhaga and the Mitakshara systems. Compare, as against the rulings just quoted, *Nathoodal v. Chhedi Sahee*, 12 W. R., 446, and *Honooman v. Bhagbut*, 15 W. R., 6, F. B. In these cases, the alienations were by the father and the grandfather of ancestral property for antecedent personal debts. They were annulled on the sole ground of not having been connected with legal necessity or any benefit to the family, and the alienations had not the support of the sons' consent. It used to be considered in those days that if the son in a Mitakshara family could show that neither he nor the family received any benefit from the transaction, the same would be annulled, and that if he failed to show this, the Court would presume that the consideration had gone to the benefit of the family, in which case, the son could recover on repayment of the purchase money, or was not allowed to recover at all.<sup>2</sup> These extreme views, of course, are not tenable now. The son has to prove something more, namely, that the debts were sinful and immoral, before he can recover the estate. The honour of inaugurating this new thought and to impose this additional *onus* on the son is attributable to that epoch-making ruling<sup>3</sup> which came out after the rulings cited above.

The decision of their Lordships in *Giridharilal's* case has indeed marked an epoch, and has introduced a new principle, as it were, for all litigations between a father and his alienee on one hand and the son on the other. The principle introduced has no doubt rendered the earlier rulings, a few of which only have been cited above, almost a dead letter and erroneous *obiter dicta*. Countless

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1. *Juggomohun v. Nimoo*, Morton, 90; See *Moteelal v. Mitterjeet*, 6 S. D., 73 (85).

2. *Muddon Gopal v. Rambux*, 6 W. R., 71; *Modhoo Dayal v. Goltur*, 9 W. R., 511, F. B.; *Mathura v. Butansing*, 13 W. R., 30; *Bhyroo v. Basisto*, 16 W. R., 31.

3. *Giridharilal's Case*, 22 W. R., 56, P. C.

earlier decisions of the several High Courts can be quoted in which by the light and lead of *Giridharilal's* case the conclusions of Courts would have been different. Ever since the promulgation of the Privy Council judgment, there have been struggles and prevarications marking a kind of departure from the view of the matter laid down by their Lordships. He is indeed a bold lawyer who would venture to allege that there has been an absolute unanimity; and who would attempt to analyse the decisions of our Indian Courts in view to reconcile them with the steady and the simple principle laid down in the Privy Council case. If he were to do so, he would meet with rulings which have raised considerations of equity and of good conscience in favour of minor or adult sons,—rulings which have been regulated by the substantive provisions of other laws, such as, the Contract Act, &c. &c.,—and also rulings which laid great stress on the proof of legal necessity and family benefit to justify the otherwise reckless, imprudent, and wasteful alienations by the father for consideration not tainted with immorality. On this subject, the following remarks of Pontifex Judge in *Parsid Narain v. Hanuman Sahai*, 1 L. R., 5 Cal., 850 will be very interesting :

“The case of *Giridharilal v. Kantoolal*, 14 B. L. R., 187; 22 W. R., 56, which is always so much relied upon, decided a question of Mithila law; and moreover, in that case, a necessity affecting the whole family was proved to have existed, for there were execution proceedings affecting the family dwelling house, or at least the father's rights therein, a sale of which had been advertized and which sale, if carried into effect, must have been detrimental to the family. Even if that case had not been explained in more recent decisions of the Privy Council, we think that the general language of the judgment, applying as it did to the particular facts found in the case, cannot be taken as an authority for the proposition that a Mitakshara father may, when no necessity exists, convey or charge the rights in specific ancestral property of the other members of the family.” The rest of the decision of the learned Judge, reproduced in the Digest of Rulings of the Judicial Commissioner, C. P., is the following:—“If no necessity exists, then a sale by the father (the sons being minors), though purporting to affect the whole 16 annas, can only pass his own right,

title, and interest. If any of the sons are adults, their consent would seem to be necessary." The case of *Upuroop Teware* (I. L. R., 6 Cal., 749)<sup>1</sup> already cited, was to the same effect and was decided next year. Similar decisions are not wanting among the reported cases of other High Courts which have treated the son's rights on an independent footing and declared the said rights as against the father's separate debts, exception being, however, made in favour of 16 annas hypothecation by mortgage executed by the father.<sup>2</sup> It must, however, be noted that in these rulings, the Courts relied on the Privy Council *dictum* in *Deen Dayul v. Jugdeep Narain* as explained in *Hardey Narain v. Pundit Babu Rudra*, L. R. 11, Ind. App., 26, and allowed in favour of the son, his share which did not pass by execution sale against the father in consequence of defective pleadings in an unrepresentative action and decree.

These are, what we may fairly call, the struggles of the Mitakshara with itself. The conflicting texts occupy prominent places in the body of the treatise. Between the principle of vested rights which necessarily introduces the doctrine of legal necessity and benefit to the family, and the principle of pious (now legal) obligation to discharge the father's debts, the apparent conflict is obvious. "There is no question," say their Lordships of the Privy Council,<sup>3</sup> "that considerable difficulty has been found in giving full effect to each of the two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other, that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are, on all points, in harmony, either in India and here." The legal obligation to discharge the father's debts has received the sanction, repeatedly affirmed, of the highest tribunal of the land. The tendency of the judicial decisions in these days, with the distinct approval of the Privy Council, is in favour of this doctrine; and the Courts in

Conflicting texts in Mitakshara and the soundness of the Bengal view.

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1. But see *contra* *Phulchand vs. Man Sing*, 4 All., 309.
  2. *Balbir Singh vs. Ajodhla prasad*, 9 All., 142; *Babajee vs. Dhuri*, 9 Bom., 305.
  3. *Musst. Nanoni vs. Madon Mohun*, 13 Cal., 35.

the Mitakshara country must necessarily admit that the theory of vested rights, in so far as it derogates from the paramount doctrine in deference to the principles of legal necessity and benefit, must considerably give way. The practical result, therefore, of mature judicial decisions, after incessant struggles and deliberate considerations of years, is to conform the theories of the Mitakshara law on this subject to the interpretations thereof accepted and followed in the Bengal School. To the credit of the learned Bengal Pandits, be it said, their commentaries on the Hindu law, contained in the Dayabhaga, which is in force in Bengal from centuries past, embody the soundest principles of the law on the point in question,—principles which admit no anomaly, no inconsistency and no possible chance of prevarication. The cardinal view of the Dayabhaga, that *qua* all kinds of property, the father has an absolute control, has found remarkable corroboration in the Mitakshara School, the existing case-law whereof presents a picture hardly distinguishable from the Bengal view.

We have just noticed the leading case of their Lordships of the Privy Council,<sup>1</sup> on the subject of alienation effected by the father of ancestral estate jointly belonging to him and his son. Their Lordships do not recognize the distinction between an alienation by private sale and alienation caused by execution proceedings. These are clearly on a level of equality in every possible respect. The principle of vested rights of the sons, adult or minor, makes no difference: and the sacredness of the father's debts for which an alienation is made or is brought about, has the same sort of bearing and legal effect on each kind of alienation. Up to the date of the passing of this memorable judgment by the Privy Council, no one can say that there had been either consistency or uniformity in the decisions of Courts including the supreme tribunal of the Judicial Committee in England in respect of the point now under consideration. This has been recognized in a passage of the decision of the Privy Council pronounced by Lord Hobhouse. Later on, the learned Judge has remarked, "destructive, as it may be, of the principle of independent coparcenary rights in the sons, the decisions have, for sometime, established the principle that the sons

Father and son Discrepancies regarding Onus of proof and legal necessity.

cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority." But the conflicts that then existed in the decisions of our Indian Courts and the want of consistency and harmony in the rulings of the Privy Council itself, owe their origin to somewhat antagonistic principles contained in the texts of Hindu Law. These texts lay down on one hand the rule of vested rights of sons in ancestral property, on the other hand they have given rise to the doctrine of pious obligation which has been subsequently developed into legal liability on the son to answer his father's creditors for all sorts of debts properly incurred. But the question is, whether the propriety of the debt depends solely on the fact that there is no taint of illegality or immorality about it, or whether it should go farther and be established that there is legal necessity for the loan or some kind of benefit to the coparcenary. No case-law, I should imagine, can destroy coparcenary and vested interests in properties. It is, on the other hand, quite reasonable to expand the scope of the legality and of the morality of the debt in question, if its validity is impugned on the ground of the father's selfishness of purpose. This will continue, I fear, to give rise to extreme conflicts of views on the question of the burden of proof. In other words, it would be asked whether, in the first instance, the son, in order to succeed, should show the immoral nature of the debt or whether the *onus* of proof as to the legal necessity of the debt, should primarily be on the creditor or on the purchaser. This I propose to discuss in detail later on, when considering the subject of Joint Family properties.

In a Joint Hindu Family consisting of father, his minor son and others, where the son has a vested interest by birth, it is always a question of difficulty to deal with the minor's estate consistently with the principles of legal necessity in such a manner as to completely bind the minor and his estate. If the family consists of a father and a minor son in the possession of ancestral estate, it has been ruled that the father cannot obtain a certificate of guardianship in order to facilitate his procedure to deal with the minor's interest in the property, if a pressing

necessity to sell or to mortgage such property arises.<sup>1</sup> Because, in an undivided estate governed by the doctrines of the Mitakshara law the rule of survivorship, and not of succession, prevails, and there is no defined share of the minor in the property for which a guardian can be appointed by the Court. The view of these rulings may not perhaps be applicable to the Dayabhaga School. But whatever that be, a cautious transferee to be on the safe side might insist that his transaction should be unimpeachable and certain for good. Under the existing view of the law on the subject, there is a clear conflict whether the *onus* would still be on the alienee to prove the legal necessity of the transaction, or the purity of the debt from the taint of immorality would alone secure his title. In a Bombay case,<sup>2</sup> the proposed transferee insisted that there should be the sanction of the Court to validate the sale in his favour by the father of the joint interest of himself and of his son in a house in Bombay. It does not appear that the father was an appointed guardian holding a certificate from the High Court. In that case it would have been easy to obtain the requisite sanction under Section 29 of Act VIII of 1890. Therefore the applicant, the father, invoked the aid of the Judges of the High Court to grant to him the requisite permission under the general powers, vested to the Court by virtue of the Charter.

Uncertificated guardian, Father and his minor son, Extraordinary jurisdiction of High Courts.

The learned counsel on behalf of the applicant produced a list of decided cases in which the High Court on previous occasions granted the permission applied for in their exercise of extraordinary jurisdiction.—Compare Section III, Act VIII of 1890. It appears to me that such a course is not open to any guardian in the mofussil of this country. Because there is no provision in the Act to regulate the conduct of an uncertificated guardian,—be he the father or any other relation, to enable him to invest his transaction involving the minor's interests in the property with authority of judicial sanction.

1. *Virupakhappa vs. Nilgangava*, 19 Bom., 309. *Shamkuar vs. Mahanunda*, 19 Cal., 301. *Ihabhu vs. Ganga*, 17 All., 529.

2. *Re Manilal, a minor*, 25 Bom., 353.

On the view of son's liability in execution of decree against his father discussed in several Bombay rulings that have been already noticed, and on the concurrent rulings of the High Courts of Madras and Allahabad<sup>1</sup> as regards the son's liability for being sued *de novo* on the footing of decree obtained against the father, there can be no manner of doubt that it is expedient to implead the sons in the original action. But as men do not always act as they should, there are the rulings which show divergent procedures. Let steps be taken, first of all, in the department of execution of decree. Bombay Courts would allow that line of action. It follows, therefore, that so far as the Courts in the Presidency of Bombay are concerned no new suit would lie against the son because the decree against the father is executable against the son in accordance with the view established in that Presidency. See Section 17, Act V of 1908. But in the Presidencies of Madras and Allahabad where the doctrine of pious obligation of son does not preponderate over the doctrine of survivorship under the Mitakshara law, a new suit against the son has been enjoined. Between the Allahabad and Madras High Courts, there is a discrepancy in one respect; and that is on the point of limitation for such suit. It is needless to enlarge on this point here.

The course of decisions of the High Court of Allahabad from a very early time upto date is an interesting study of the shifting burden of proof in cases of alienations by the father of joint ancestral property. It would be needless for me to cite and to classify the divergent views of the High Court in a catalogue form. I would, for the purpose of my observations in this paragraph, refer to a ruling of the Divisional Bench of Allahabad<sup>2</sup> passed in the year 1902. In the first place I would remark that the form of the action was all that could be desired. Besides the executants of the mortgage, namely, the father and some of the sons, the obligee impleaded as defendants another son and grandsons who were not parties to the mortgage and

Suit on decree against father.  
Son's liability and limitation.

Mortgage by father and some of the sons.

Representative suit against the family.

Onus of proof, legal necessity.

1. Badri vs. Madan, 15 All., 75. Mallesam vs. Jugala, 23 Mad., 292. Natasayyan vs. Ponnu Sami, 16 Mad. 99. Nursing vs. Lalji, 23 All., 206.

2. Debi Dat vs. Jadu Rai, 24 All., 459.



The following discussion relates to the obligation on the son to discharge the surety-debt due by his predeceased father. Ordinarily speaking, surety-debt does not fall under the category of legal necessities and obligations in any other relation except in that between a father and son. For instance, it can hardly be contended that a reversioner would be bound by the results of the widow's surety transactions, the minor by those of guardian's, the coparceners by those of manager's, and so forth. But with reference to the surety-debt due by the father, quite different considerations, that is, considerations of the son's moral obligation crop up and demand decision by Courts. Remarks of Mr. Mayne in para 304 of his book, 6th Edition, that a son is not compellable to pay, *inter alia*, sums for which the father was surety, are, in the opinion of Mr. Justice Ranade of Bombay, too sweeping a generalization.<sup>1</sup> The context in Mayne where the above passage occurs suggests the right view that surety obligations recklessly incurred stand in the same category with other extravagant or immoral debts of the father which entail no liability on the sons. Subject to the above restriction, the question is, does the son's pious duty to pay his father's debt, untainted in any of the recognized exceptional ways, attach in the case of a debt incurred by the father as surety for payment? The question is an important one; and the decision of Ranade, J.<sup>2</sup> offers the best possible key to the solution of the above question. Referring to the text-books from Manu onwards, the learned Judge enumerates the four classes of sureties recognized by Hindu law. He then points out the consensus of the texts that for the first two classes,—viz., sureties for appearance and for honesty, the fathers are liable, and not the sons. Whereas the obligations incurred by the last two kinds of sureties, viz., for payment of money lent and for goods delivered, bind both them and their sons after the death of the fathers. This appears to be supported by Max Müller's Sacred Book of the East, Sections 159 and 160; Brihaspati, Sections 40 and 40; and Colebrook's Hindu Law, Vol. 1, p. 164,

1. As to a fair guarantee by father, see Gopal Singh v. Bhawani Prasad, 10 All., 531.

2. Tukaram v. Gangaram, 23 Bom., 454.  
 Sitaramayya v. Venkatramanna, 11 Mad., 373.  
 Jayanti v. Alamelu, 27 Mad., 45.  
 Chettikulam v. Chettikulam, 28 Mad., 377.

Chap. 142. In a subsequent decision<sup>1</sup> by the High Court of Allahabad the question of father's guarantee and the son's liability therefor came up for decision. The Allahabad Court following an early decision of their own and the decisions of Bombay and Madras considered already, held that the son was liable for the guaranteed debt. Because the said debt was not of the exceptional classes mentioned by Ranade, J., but it was for the due payment of rent by the lessor to the lessee.

Thus we find there is a practical consensus of views of the High Courts of Bombay, Madras, and Allahabad in respect of pure surety-debt incurred by the father. Debt of suretyship with taint of immorality is not chargeable against the son. This will be found in the classification of such debts made by Ranade, J. in the Bombay case noticed above. But the other kinds of surety-debts for which the son is liable are undoubtedly debts of a personal nature due by the father alone. Consequently, according to the current views of High Courts mentioned above, the obligation on the son to pay such debts is not dependent on the proof, on the part of the creditor, that such debts had the support of legal necessity or benefit to the family. We find it in the discussions contained in those rulings that such debts, if contracted by the widow, would not bind the reversioner; if contracted by the guardian, would not be binding on the minor's estate; if contracted by the manager or any other coparcener in a joint family, would not bind the estate of the family, and so forth. Yet, we find it authoritatively laid down that the son and his estate would be bound to answer a claim of this sort. Here the doctrine of moral obligation on the part of the son prevails over the doctrine of legal necessity as between a father, his sons, and his grandsons.

It would be seen from the discussions in this Chapter elsewhere that in accordance with the views that prevail in the Presidency of Bombay, as distinguished from those in the rest of India, there is no necessity for a fresh suit against the son to enforce the personal decree against the father. Of course the Indian Courts are at one in cases of decrees which carry a

Father's debt, Son's liability: Legal necessity, no criterion.

New suit by or against son or coparcener, Execution proceedings, Existence and nature of debt scrutinized. Legal necessity.

1. *Maharaja of Benares vs. Ram Kumar*, 26 All., 611.

charge on the property either by reason of mortgage or by attachment during the life-time of the judgment-debtor. But when there has been a personal money-decree against the father, no other Courts in British India than those of the Bombay Presidency, would allow the said decree to be executed, after the father's death, against the assets in the hands of the son after such assets have been acquired by the law of survivorship under the Mitakshara doctrine. But apart from this technical discrepancy of the adjective law of procedure the Courts are unanimous in holding that the sons and grandsons of a deceased judgment-debtor are not liable to answer a decree the nature and origin of which are illegal or immoral. It is the same whether the sons are proceeded against by execution of decree or by a fresh suit or whether they institute a fresh action claiming exoneration from the decree or the sale of property brought about by the execution thereof. The High Court of Madras has held that if the money liability for a mortgage by a father is on account of defalcations which amount to the offence of criminal breach of trust, the sons are not liable under the mortgage.<sup>1</sup> The learned Judges of Madras relied, for their support, on a previous decision of the same High Court and also on the rulings of Calcutta and of Allahabad.<sup>2</sup> But, with reference to the Madras case cited last, the learned Judges have remarked that the case was distinguishable on

Civil liability	the ground that the father's liability was on
<i>vs.</i>	account of a civil breach of contract. The
Criminal liability	liability that had been incurred by the father
of a father.	in the 16th Volume of the Madras case arose

out of his failure to render an account to the plaintiff's family. It was characterized as an act of dishonesty on his part. Nevertheless, the Judges did not consider the debt to have been of an immoral origin. I do not know if the provisions of the Indian Penal Code constitute a full and complete code of morality in the contemplation of the Hindu Law texts bearing on the subject. In this respect the early Madras decision under consideration does not contain any convincing or satisfactory exposition of law. In their later decision, the Madras Court has observed that though the general conclusion

1. McDowell *vs.* Ragava, 27 Mad., 71

2. Natasayya *vs.* Ponnusami, 16 Mad., 99. Pareman *vs.* Bhattu, 24 Cal., 672. Mahabir *vs.* Basdeo, 6 All., 234.

arrived at in the early ruling is ~~is~~ correct, all the reasonings were not consistent or accurate. In my own humble opinion the idea of immorality goes much farther beyond the precincts of the stereotyped Penal Code of the Indian Legislature. But apart from that question, there is an important point in the case which was noticed in the early part of the judgment of the Madras case reported in Volume XVI. The sons in that case contended, *inter alia*, as defendants in the new suit filed by the creditor, that there existed no debt as the foundation for the decree itself against their deceased father. It was like a plea by the sons that besides the said debt being of an improper and immoral nature, a *de novo* enquiry would show that, as a matter of fact, there was really no debt owing by their late father. The learned Judges held that the sons were not entitled to raise such a plea in the new suit. Why? Where do the Judges find in the texts of Hindu Law or in the Code of Procedure or on grounds of equity, justice, and good conscience, any justification to shut out the defendants from any of their legitimate pleas in defence? It would perhaps be in-

Serious objection to the Bombay view of executing father's decree against son.

telligible if the view of law throughout the country were uniform that in proceedings in execution of decree against the father the son is a party within the meaning of Section 47 of Act V of 1908. This, as stated above, is the peculiar view of the Bombay Courts. In that case of course it could reasonably be said that the Court executing a decree cannot so far go behind it as to enquire whether the decree could have been legally passed on account of the non-existence of the debt itself. But, I should imagine that even in the Presidency of Bombay the son has a right by impeaching the nature of the father's liability which resulted in decree to demand the release of his interest in the execution or sale proceedings. If, therefore, I be right in contending that in a new suit by the creditor or by auction-purchaser against the son or any other coparcener the defendant is entitled to plead and to show that the foundation for the decree was as a matter of fact wanting, it would follow that such a plea is not available to a son in the Bombay Presidency, though it is available elsewhere in the country. If illegality or immorality of debt be regarded under the case-law and the *Shastras* as a successful weapon in the hands of the son to ward

off the impending liability against him, *a fortiori* the entire non-existence of the debt itself should undoubtedly be capable of proof to escape liability. Again, take the case of a creditor or of a mortgagee of a Hindu father instituting a representative action arraying as parties, the father and his sons as joint defendants. It is needless to say that the sons have the same right as their father, the obligor, to question the existence of, and not merely the necessity and the moral obligation for, the debt. Under the rules of pleading in force in this country, it is not the special privilege or the sole prerogative of the father as a defendant alone to plead want of consideration in a case of this sort: and there is no disability or disqualification on the part of the sons as defendants to adopt the same plea against the plaintiff's claim. Under no consideration of ethical principles laid down in the texts of Hindu Law are the sons debarred from pleading the very non-existence of the debt on which the action is based. But it is a very strange irony of justice that in the Presidency of Bombay where the sons can be impleaded as parties in execution proceedings against their father, it is not in the power of the sons to go behind the decree and question the non-existence of the original obligation. But in the Courts of the other Provinces and Presidencies of India where a new suit by or against the sons is permissible in practice, they have every right (barring the peculiar view and the *obiter* in the Madras decision in Volume XVI cited above) to plead and to prove the absence of consideration. I would, therefore, humbly suggest that the sooner this strange anomaly is removed from the case-law on the subject, by the Bombay Courts conforming their view to those prevailing in the rest of India, the better it would be for the aims of justice and for logical consistency.

Quite analogous to the point now under consideration, are the cases of father's alienations of ancestral properties for grossly improper and inadequate value. If the son can raise an equity on his side and assail an inequitable transfer by his father on the ground of inadequate price,—inadequate with reference to the purpose or the family need,—it goes to confirm my view stated above that absolute want of consideration stands on a

Alienation by father,  
Inadequate consideration,  
Equitable refund.

higher footing. In another Madras case<sup>1</sup> for a debt of Rs. 1000 due by the father, the propriety or morality of which was not impugned, a house worth Rs. 11000 was conveyed by the father. The minor sons through their assignee sued for cancellation of the sale *ab initio*. The High Court viewed the transaction in the light of a sale to the extent of Rs. 1000 ; i.e.,  $\frac{1}{11}$ th of the house, and of a gift of it to the extent of  $\frac{10}{11}$ . Thus then the limit of gross iniquity was high. And therefore a correspondingly strong equity arose in favour of the claimant. The sale was set aside, and restitution was ordered in favour of the parties. The learned Judges of

Gift of ancestral property by father—nullity.

Madras viewed the conveyance of  $\frac{10}{11}$ th of the estate in the light of the father's gift to the vendee. Following the prevailing view on the subject in the Southern and Western Presidencies of India the gift of such a large share of the property by the father was treated as a nullity against his sons. But as it was found that the antecedent debt of the father untainted by illegality or immorality, was to the extent of Rs. 1000, restitution of the property to that extent was decreed in favour of the sons with mesne profits subject to the refund of Rs. 1000 with interest. The High Court assessed the rent of the house at Rs. 45 per month and the interest at 9 per cent. In the result the vendee received less than half the amount of the original debt and was obliged to restore the property to the owner.

Babu Golap Chandra Sarkar, Sastri, the learned author of *Hindu Law*, Third Edition (1907) pp. 245, 246 remarks as follows :—“The marriage is the last of the sacramental or purificatory ceremonies which a father has to perform on his child,

Children's marriage by father. Legal necessity. Son's moral obligation.

hence provision is made for it when partition is made. It would therefore be erroneous to suppose that the father is under no kind of obligation legal, moral or religious to celebrate the marriage of a son.” And again in pp. 106, 107 :—“Although the aforesaid texts enumerating certain relations having the right or duty in their order, of disposing of maids in marriage, may be held to be of moral obligation only, still there is abundant authority in the Smritis and the Commentaries, for the proposition that the father is legally liable to celebrate the

1. Rottala v. Pulicat, 27 Mad., 162.

marriage of his maiden daughters, that the expenses of the marriage of a damsel, and her maintenance until marriage, form legal charges on the property of the family, of which she is a member by birth. See Mit. 1, 7; Vir. 2, 1, 21; D. B., 3, 32 et seq. Even the daughters of those that are excluded from inheritance, are to be maintained and married at the cost of the family property. It is difficult to understand the principle underlying the view expressed by a Brahman Judge of Madras High Court, viz. that under the Hindu Law a father is not under legal obligation to get his daughter married: *Sundari v. Subramania*, I. L. R., 26 M., 505. But see I. L. R., 23 M., 512 & 26 M., 497, in which a brother taking by survivorship the undivided coparcenary interest of a deceased brother was held liable to pay the expenses of the latter's daughter's marriage." While concurring entirely with the views of the learned author quoted above I beg leave to point out that it is very doubtful whether another ruling of the Madras High Court,<sup>1</sup> cited below, is sound and fit to be followed. In that case the father with the consent of an elder son celebrated the marriage of another son by the sale of some land which formed a part of the family property. It is not disputed that the sale was not necessary or that the funds were otherwise available or forthcoming. But the two other non-consenting sons,—or, more accurately sons whose assent to the marriage was not expressly asked or refused—instituted proceedings to set aside the sale to the extent of their interest. Both the Courts below held the transaction of sale to be valid and binding on the disputing sons. The learned Judges of the High Court of Madras reversed the concurrent decisions of the lower Courts and held, on the authority of Mr. Mayne's observations in the 6th Edition of his work, para 336, and on a learned analysis of the leading texts on the subject that the father was not bound morally or legally to celebrate his son's marriage, and that if he did so, it was at the cost of his own interests in the property.

On this subject Mr. Mayne's observations are :

Son's marriage by father. Is it legal necessity ?	"It is an established rule that a father can make no disposition of the joint property which will prejudice his issue, unless he obtains their assent, if they are able to give it, or unless there is some established necessity, or moral, or religious obligation to justify the transaction."
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This is an extract of an isolated thought by Mr. Mayne that does not strictly occur in his discussions as regards the necessity or otherwise of son's marriage by his father. Surely, Mr. Mayne would not use the above words in reference to the father's or mother's obligation to marry a maiden daughter. The texts and commentators are unanimous on this point. But the Madras Judges considered most of the leading texts in respect of the son's marriage by the father and came to the conclusion that the views preponderate against the necessity of incurring a debt or selling ancestral property to procure a wife for the son. The opinion so expressed is no doubt revolting to the ordinary intelligence of the people. Both sides of the question are capable of being discussed at considerable length. But having regard for the traditions and the common belief and customs of the Hindus of this country, I must, in all humility differ from the decision arrived at in the case under notice. Because even if it be conceded that the father is not under the legal or moral obligation to marry his son there can be no question that the debt incurred for the purpose by the father is not of such immoral or illegal nature as to exonerate the other sons from the liability in accordance with the decisions of the Privy Council. With respect to the legal necessity for the debt or alienation, there may probably be two opinions : and in that view of the matter this ruling indicates once more the assertion of the supremacy of the doctrine of legal necessity over that of the pious obligation of the son in the decision on the transactions by the father affecting the joint or ancestral estate under his management and control.

The question of son's liability on the money-decree obtained against the father or on decree for foreclosure or sale, after his death, is one of frequent occurrence. Such cases are very common in the Madras Presidency, as far as the law-reports go. This question has been discussed at considerable length by a Full Bench<sup>1</sup> of Madras. It is a recognized principle of law throughout the Mitakshara country, with the sole exception of the peculiar views obtaining in the Presidency of Bombay, that a simple money-decree against the deceased father, or for the

Decree against father, suit on decree against son after father's death, Limitation. Antecedent debt.

1. Periasami v. Seetharama, 27 Mad., 243.



matter, against the deceased coparcener practically perishes with the deceased debtor. This is based on the fundamental doctrine of the Mitakshara law that the interest of a father or of a parcener in the joint or ancestral property of the family simply lapses on his death and the surviving members get the same by the fiction of an invisible process. Under such circumstances it becomes necessary in cases where all the necessary parties were not impleaded in the previous action to initiate proceedings to render the survivors of the deceased judgment-debtor liable under the decree. On this subject as well as on the question of limitation for such new suits there were some conflicting rulings for which reference was made to the aforesaid Full Bench for an authoritative decision. The facts were that plaintiffs, in 1896, obtained a decree against the father. The decree was for value of goods supplied. The Limitation for a claim of this sort is under Article 52 of the Limitation Schedule. The claim against the father was within time and it was accordingly decreed. On the execution being taken after his death the sons and the other members of the family objected to the attachment of their property. The objection prevailed, and the decree-holder was compelled to institute a suit against the survivors. Among these were (1) the deceased's brothers and (2) his sons. The latter carried their contentions upto the final Court of Appeal before the Full Bench. The claim against the former was dismissed by the Lower Appellate Court. Before proceeding with the discussion of the matters contained in this important judgment I feel bound to remark that the decree-holder had undoubtedly a cause of action against both the sets of defendants, with this variation that whereas the family necessity and purposes are common to all, the pious obligation on the sons of the deceased imparts an additional strength to the claim against them. I reserve the discussion of the former point for consideration later on; and proceed with the matter of controversy between the decree-holder and the sons of the deceased judgment-debtor in accordance with the ruling under notice. The questions settled before the Full Bench are (1) the limitation for such a suit is co-extensive with that of the father in reference to the original claim against him. If the period was 3, 6, 12 etc. years against the father, the same period would be available against

the sons from the identical starting point of computation. (2) The decree-holder could base his claim on the decree as affording him an independent cause of action with six years' limitation under the omnibus and residuary Article 120 of the Limitation Schedule. It may often happen that as the creditor leaves a narrow margin of time before suing the father on the original cause of action, such time, if computed against the sons from the same starting point would have been over at the time of the suit against them. Hence, the Full Bench ruling gives to the decree-holder another period of six years from the date of this decree to recover his money from the sons or their share of the estate. In either case of course the *onus* would be on the sons to prove the exceptional nature of the debt for which, under the authorities, their interest in the property is not liable. At page

Antecedent debt against father.

326 of the same volume, *Chidambara v. Koothaperumal*, the son was sued with the father on a mortgage passed to the creditor by

the latter. The view of the Lower Appellate Court that the son could not be bound if the plaintiff had adduced no evidence as to the purposes of the loan, was upset on the ground that the *onus* was on the other side to prove the exceptional nature of the debt. The next point urged was that the debt could not bind the son, as it was a loan incurred at the time of the mortgage and not an antecedent debt. *Sami v. Ponnammal*, 21 Mad., 28 was relied on as an authority for the distinction between the present and the antecedent debts. The Judges said that two later decisions of the same High Court and a current of unanimous decisions of Bombay, Calcutta, and Allahabad have exploded the reason and the theory of the distinction, on the ground, mainly, of the son's pious obligation to discharge both sorts of debts equally.

According to the view of Mitakshara law propounded for the first

Decree against father or coparcener. Erroneous procedure prevailing.

time in some early rulings of the Madras High Court and considerably developed in that Presidency, as it can be gathered from the Full Bench

case cited above, it is illegal to allow execution of decree passed against the deceased father or coparcener to proceed against the deceased's survivors, or against the deceased's estate or interest in the

coparcenary properties. Such properties may be either joint or ancestral. In practice, as it more or less prevails in the country, the deceased's interest in the estate is viewed in the light of his assets devolving on the survivors within the meaning of section 50 of Act V of 1908 (old section 234 of Act XIV of 1882). Nothing can be more repugnant to the fundamental doctrines of the Mitakshara law. It is only the self-acquired or the divided estate of the deceased which can be regarded as his assets descending on the heirs; and no other than the Dayabhaga School of law recognizes the doctrine of devolution of the undivided interest of a coparcener on the surviving members of the family. Therefore it is clear that if the judgment-debtor dies in any part of the Mitakshara country and execution of decree is taken against his survivors, the latter are bound to succeed to exonerate the entire interest of the family estate from the clutches of the decree-holder. Mofussil experience, however, shows that a large number of such erroneous proceedings are going on before the Courts without a word of protest. If those proceedings be regarded, as they legally should be, abortive and repugnant to the cardinal doctrines of the Mitakshara law, the only remedy for recovering the debt is to proceed on foot of the solemn debt of record, that is, the decree itself as the basis of a new suit against the survivors,—be they the deceased's sons or brothers etc.

It would be useful to suggest the line of procedure by laying down a sort of draft-plaint for the new suit. I draw my hint from the facts reported in page 244 of I. L. R., 27 Madras. After reciting the names of parties and stating both the original cause of action and the decree obtained against the deceased as the basis for the suit, the plaint should recite how the debt and the decree are binding on the estate in the hands of the survivors. The plaint may further recite that the claim is within limitation either by reason of the non-extinction by lapse of time of the original cause of action, or by stating that the decree was passed within six years prior to the date of the suit. Other particulars or details should be inserted according to the nature and the circumstances of each case. The Courts of Calcutta and Allahabad support

Form of plaint of  
new suit against sur-  
vivors.

the same view.<sup>1</sup> But we find it in a later decision of Calcutta<sup>2</sup> that

Decree against deceased father or coparcener, execution thereof and estoppel.

new principle of estoppel was introduced by the learned Judges against the plea of the surviving sons of a deceased Hindu father against whom simple money-decree having been passed the said father died. The execution was taken out against the sons in the usual way as it is now being done in many Indian Courts, as the legal representatives of the deceased judgment-debtor. In the case under notice the sons did not at once object to the proceedings taken against them. On the contrary, they made applications for the stay of sale and paid a part of the judgment-debt. It then appeared to the so-called legal representatives of the deceased judgment-debtor that though they were rather late in the day in objecting to the proceedings against them in strict accordance with the principles of the Mitakshara law, yet as the said law stood they could claim exoneration under the authorities that stood. The High Court ruled the sons were estopped from advancing the plea at such a late stage of the proceedings. This ruling stands as an isolated instance to justify the rule of equitable estoppel against the direct mandate of the law. It is at the same time a solid vindication of the current practice of execution proceedings against the deceased coparceners of Mitakshara families in India. But whether

Survivors in Mitakshara families not legal representatives.

that current practice would continue to last and find support from the Calcutta case cited above is more than what I can predict. I think it would, if the theory of the Mitakshara law relating to the doctrine of the lapsing of estate and the augmentation of the interest of the survivors were merely a matter of academic subtlety or a fascinating quibble. But having regard for the solid and the settled views of Courts for upwards of the last quarter of a century, it is impossible for us to take such a light view of the matter and to say that the Mitakshara doctrine of survivorship can be abrogated by an alleged fanciful view of equitable estoppel. On the contrary, we find that in order to avoid

1. *Jaggannath v. Sita Ram*, 11 All., 302; *Lachmi Narain v. Kunji Lal*, 16 All., 449; *Madho Parshad v. Mehrban*, 18 Cal., 157 (163); *Juga Lal v. Audh Behari*, 6 Cal., W. N. 223; *Kali Krishna v. Raghu Nath*, 31 Cal., 224; but see *Ramdas v. Braja* 6 Cal., W. N. 879 which is dissented from the last mentioned case.

2. *Coventry v. Tulshi*, 31 Cal., 822.

any future conflict of views arising out of the confused ideas on the subject of legal representatives, the Indian Legislature have, in the New Code of Civil Procedure, Act V of 1908, defined that expression. The said definition has been quoted in an earlier chapter of this book. It has classified the legal representatives to be such persons 'who in law represent the estate of a deceased person' and includes also persons who intermeddle with the estate of the deceased, and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.<sup>1</sup> But it would be conceded that the survivor in a Mitakshara family, whether he claims the estate as a plaintiff or whether he is sued or proceeded against in execution, is neither the one nor the other. In that view of the matter it seems hard to follow the aforesaid Calcutta ruling as an authority under the present state of the law.

The Madras ruling<sup>2</sup> by Sir Davis and Bhashyam Ayyangar, JJ., has raised unfavourable comments in certain quarters. Babu Golapchandra Sarkar, Sastri, in the third edition of his book on Hindu law, p. 107 has remarked that it was unworthy on the part of a Hindu Judge of the High Court of Madras to have given expression to the unsound doctrine that a Hindu father is not under the legal obligation to get his daughter married. The principle, however, of the ruling under consideration is to be sought for elsewhere and not in the head-note or the short *placitum* of the judgment. Really it is a case of conflict or contention between the parents of the maiden daughter for her marriage. What the ruling essentially decides is that the proper guardian of the daughter, that is the legal guardian for her person and property, has the superior voice and control for the disposal of the girl in marriage, and that it is not competent for a recalcitrant wife against her husband or for a divided brother against the mother of the girl to raise the bogus of legal necessity by exercising her or his independent right of selection of a bridegroom for

1. Act V of 1908, section 2, clause (11).

2. *Sundari vs. Subramania*, 26 Mad., 505.

the daughter or of her marriage. If the ruling goes beyond this, it is wrong. But that it means or purports not to go beyond this reasonable limit is apparent from the quotations of the earlier decisions of the Madras High Court to be found in the judgment.

The recent Full Bench decision of the High Court of Allahabad<sup>1</sup> has contributed to render the law on the

Joint or ancestral estate, father's liability. Illegality or immorality v. family benefit and legal necessity. *Onus* of proof.

subject of son's liability to answer the debt or obligation of his father still more unsettled than what it was prior to the promulgation of the ruling. We are aware that the view of law was not quite uniform in India as well as in the Privy Council upto the moment when the Lords of the Judicial Committee decided the case of *Nanomi v. Modhun*, I. L. R., 13 Cal., 21. Lord Hobhouse with the advice and assistance of his learned colleagues on the Board recognized the discrepancies then prevailing and stated in the most emphatic terms what in future should be the governing Hindu law on the subject. Making the liability of the father as an exception to that of any other coparcener in a joint Mitakshara family their Lordships of the Privy Council definitely declared that the liability of or the alienation by the father as the head of the family, must, unless the sons could claim their freedom therefrom by proving the exceptional nature of the debt incurred by their father, be given effect to although such exceptional treatment might tend to prove a cause of disaster to the family or of destruction to the vested interests of the sons in the coparcenary estate. After this most authoritative pronouncement we would be perfectly justified to side with the views<sup>2</sup> of the leading authors on Hindu Law extant in the country and to err, if it be so, with the decisions of Bannerji and Richards, JJ. of Allahabad who differed from the decision of the majority in the Full Bench case cited above. Were it otherwise, the Hindu father of a Mitakshara family owning joint or ancestral estate would be brought down to the common rank and level of the ordinary coparcener, and the especial texts in the ancient Hindu Law treatises and the

1. *Chandra Deo v. Mata Prasad*, 31 All., 176, F. B.

2. Mayne, 7th Edition, section 303.

old traditional reverence due to the Hindu father should be obliterated from the books as well as from the memory of the living generations of the Hindus. The theory of the benefit to the family and of the legal necessity for the debt or charge is common to all other natural and fiduciary relations discussed in the several Chapters of this book, while the leading authorities that now prevail in this country concur to treat the father's transactions from a different standpoint. In the case of the former the *onus* is on the creditor or transferee to prove the legal necessity of the transaction, but in the latter case the burden is shifted on the sons to prove the exceptional nature of the debt or obligation in order to secure for them immunity therefrom.

Another vexed question regarding which there is an apparent conflict of views in the decisions of the High Courts of India deserves consideration here. It arises in this way. If the father as the head or *kurta* mortgages a part of the joint or ancestral family property for a debt which is binding on the sons and grandsons, and if in enforcement of the mortgage the encumbered estate is sold by auction or by foreclosure proceedings in execution of decree obtained on foot of the mortgage-debt, the questions are—can the sons recover their share of the property on the ground that they were not made parties to the decree or in the execution proceedings, or can they for the same reason of their non-joinder claim to redeem the estate on payment of the valid legal debt of mortgage? The aforesaid questions have

Joint and ancestral property. Father's mortgage, sale or foreclosure thereof, son's rights or liabilities, claim for redemption.

Section 85, Act IV of 1882=O. 34, R. 1, S. 1, Act V of 1908.

been formulated with reference to section 85 of Act IV of 1882. The said section has now been repealed by section 156 of Act V of 1908 which has in Schedule I, Order XXXIV, Rule 1, reproduced the provisions of the original law contained in section 85 of the Transfer of Property Act in a somewhat modified and amended form. The rule now runs thus: "Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a

a subsequent mortgage." The slight change in the body of the rule and the addition of the Explanation have been intended to leave no room for some of those anomalies which have arisen out of the previous section in the Transfer of Property Act. The said anomalies consist of conflicting views,—notably in the decisions of the High Court of Allahabad in respect of suits by mortgagees wherein persons interested in the mortgage were omitted to be impleaded. We have no reason or necessity to enter into that controversy here. Confining ourselves to the discussion of the two points suggested above, we have no hesitation to answer the first question in the negative. This is of course on the supposition that the claimants do not establish the illegal or immoral nature of the debt for which the father had given the mortgage. In the case cited below an elaborate discussion has been held, by way of *obiter*, and it has been decided that though it is not permissible for a son to recover his share from the clutches of the mortgagee and his execution proceedings for sale held under the mortgage, the son not proving the exceptional nature of the debt covered by the mortgage, yet if the son had evinced his intention to redeem the mortgage, the learned Judges were prepared to grant him the relief on the sole ground that the mortgagee-decree-holder had all along the notice of the son's interests in the ancestral property mortgaged by the father.<sup>1</sup> This was too large a premium for the supposed sanctity of the provisions of section 85 of the Transfer of Property Act, and this the learned Judges of Calcutta were prepared to grant although the plaintiff's suit was of a different character. The said suit was rightly dismissed by the Court below<sup>2</sup> and the Court of appeal substantially confirmed that judgment. The academic discussion on the law contained in section 85 T. P. Act, was altogether misplaced. It would have been something to the purpose, if the son's suit, which had been instituted before the sale was made absolute in February 1894, had been a claim for the redemption of the mortgage. But even then, it is the opinion of Ghose, J. that the claim could have been non-suited on the ground that the father had been sued in his representative character, and that to

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1. *Lala Suraj v. Golab*, 28 Cal., 517.

2. *Lala Surja v. Golab*, 27 Cal., 725.



all intents and purposes the son should be deemed to have been a party in the mortgage suit.

In the Calcutta case cited above the minor son through his guardian lost no time to nullify what he called the effects of his father's reckless extravagance. The latter, almost in his teens, incurred heavy pecuniary liabilities and encumbered the ancestral estate to the prejudice of his minor son. The latter deserved all the sympathy and protection which our Courts of law and equity could grant, although he was unable literally to show the immoral or illegal character of the debt. If, following the recent Full Bench decision of Allahabad, noticed above, the *onus* had been on the creditor to prove the legal necessity for the debt, it is doubtful if the mortgagee could have absorbed the son's interests for the satisfaction of his claim. Whatever that be, the son's action was prompt and before the auction sale was made absolute. But what would be the case after the completion of the foreclosure or of the auction sale in a suit against the father? Would the language of S. 85 of T. P. Act, or that of the substituted adjective rule of procedure in Act V of 1908, go the length of reopening the exhausted remedies of the mortgagee's suit after he had completely closed the transaction by a representative action against the father? Once if it is conceded that the mortgage by the father or by any other managing coparcener created a valid charge on the estate, and that the action for the enforcement of the charge against the mortgagor was in his representative capacity, the idea of vested interests in the sons and others and the latter's rights of representation in the mortgage suit to give to them an opportunity to redeem the mortgage, become matters of utter insignificance. The authorities cited below go a long way to prove the correctness of this view.<sup>1</sup> The opinion of Bannerjee, J. in the last mentioned Full Bench case is in strict accordance with the prevailing decisions of Courts. The majority on the Bench have attached undue importance to the adjective law embodied in S. 85, T. P. Act without disputing the fact that the original suit on the

1. *Daulat vs. Mehr*, 15 Cal., 70 (P. C.); *Devi vs. Sambhu*, 24 Bom., 135; *Bhawani vs. Kallu*, 17 All., 537 (F. B.).

mortgage against the father was such, that to all intents and purposes his sons were parties to the action. The decision of the majority of the Allahabad case has been dissented from in Madras,<sup>1</sup> where the current of decisions goes to show that after the decree against the father alone on a mortgage executed by him and after the sale of the mortgaged property in the execution of that decree, the only ground to contest the sale and to recover the shares of the sons is the proof by the latter that the debt was tainted with immorality or fraud. This ground of action is of course by a new suit by the sons against the father, the mortgagee, and the purchaser. But this sort of new suit is entirely different from the claim on the part of the sons to redeem the mortgage on the ground that they were not made parties in the suit on the mortgage against the father. I do not for a moment mean to say that a suit for redemption by the sons under the circumstances stated above does not lie. But having regard for the provisions of the Hindu Law that govern the relations between a father and his sons and for the trend of thought in the rulings of the several High Courts and of the Privy Council quoted above, it would appear that the only way for the institution of a redemption suit is by establishing the non-representative character of the previous suit against the father. How the plaintiff should or could show this, is no concern to me. But I will here point out that the bare fact of the mortgagee's notice or knowledge of the existence of the sons at the time of the action has no longer any bearing in the matter because the clause to that effect has been removed from the rule of procedure now enacted in the C. P. Code.

In cases of decrees founded on mortgages executed by the father, the *kurta*, or the managing coparcener, it must, ordinarily speaking, be presumed that the suits which ended with decrees were representative actions.<sup>2</sup> The properties involved may be either joint or ancestral. The sons or other members who are not parties to the mortgages, and who are not impleaded in the suits, can only escape from the

Suit against father and sometimes mother regarded generally as representative action.

1. Ramasamayyan vs. Virasami, 21 Mad., 222. Palani vs. Rangayya, 22 Mad., 207.

2. As to mother of minor sons see Devji v. Sambhu, 24 Bom., 135.

liabilities by pleading and proving the exceptional nature of the obligations created by the mortgages. By exceptional nature I mean, for the sons debts of immorality or illegality, and for the coparceners debts not beneficial to the family. If such a case is not made out, the whole property involved in the mortgage will pass. It has been held<sup>1</sup> that if, after the passing of the mortgage decree, the judgment-debtor dies, the impleaded son or coparcener can be proceeded against in execution. He cannot get rid of his liability to be proceeded against, barely on the ground that he was not a party to the mortgage or to the suit. Nay, I go farther. On the death of the mortgagor, the son or the coparcener, as the case may be, can be sued on the mortgage. The question of a simple money-decree against the deceased father or the deceased joint coparcener may not be executable against the survivor, because under the fundamental theory of the Mitakshara law, there is no such thing as the assets of the deceased joint member coming or descending to the surviving member.<sup>2</sup> But the rulings of Bombay and an unreported decision of a Division Bench of the Calcutta High Court<sup>3</sup> show that a money-decree against the father was allowed to be executed after his death against the ancestral property in the hands of the son, *which had been attached in the father's life-time*, the son being only permitted to have the question tried under section 47 of Act V of 1908, as to whether the debt had been contracted for immoral purposes. I have laid stress on the passage italicized above to indicate a point of very great importance. It should be carefully remembered that the attachment of property in the life-time of a deceased coparcener judgment-debtor, whether he is the father or any other member of a joint coparcenary, and whether the property is ancestral or joint, has the same effect and has the same legal consequences as if the property had been mortgaged. In other words, the decree-holder is entitled to implead the survivor in the proceedings for the execution of decree in the same manner as if the original suit and decree had been of a representative character.

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1. Chander Pershad vs. Shamkoer, 33 Cal., 676.

2. Kali Krishna vs. Raghunath, 31 Cal., 224.

3. Omed vs. Goman, 20 Bom., 385. Colleveridge vs. Pheku unreported see 33 Cal., 677.

This procedure is quite permissible under the joint operation of sections 47 and 50 of Act V of 1908. The term "legal representative" has now been defined by section 2(11) of Act V of 1908, and it clears up the doubts which arose in the construction of the words in the corresponding section (234) of the former Code.

The new definition runs thus:—"Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued." The word used is *devolves* which obviously means acquired by succession or by the right of survivorship. The scope of the previous law as to execution of decree contained in section 244 of Act XIV of 1882 has been considerably expanded by S. 47 of Act V of 1908. Sub-section (3) now makes it incumbent upon the Court to decide questions as to representative character arising under section 47 of the new Code. It appears that no option is given to remit the parties to a separate suit.

The altered language and the widened scope of section 47 of Act V of 1908 make it imperative that a separate suit shall not lie to decide the question of liability of the representative of a deceased judgment-debtor. The question of representation does not, of course, arise till after the death of the judgment-debtor. It is not within the compass of this book to discuss at length the provisions of an adjective law. It is sufficient for my purpose to state that when a decree has been passed against any person in his representative character, and that person dies before the decree has been completely executed, any other party who comes within the purview of the expression "legal representative" defined by s. 2 (11) of Act V of 1908 cannot sue to claim exoneration from the clutches of the decree. When the decree-holder proceeds by way of execution, such party is necessarily impleaded in the proceedings. All possible contentions against the decree and its execution will be heard and determined by the Court executing the decree. I am concerned in these pages to set forth instances of

'Legal Representative'  
defined in S. 2 (11) of  
Act V of 1908.

Bar to suit in decrees  
passed in representative  
actions.

representative actions. The above remarks will be held to apply to the decrees passed in such actions. But at the same time, it must be conceded that both during the pendency of the suit, and in the lifetime of the judgment-debtor, any other party is fully entitled to assert his personal right by a separate suit. In a decision<sup>1</sup> of the Bombay High Court, which was a case of a mortgage executed by a widow with two minor sons, the mortgage was to pay off a debt due by her husband. Subsequently a money-decree was passed against her for another debt due by her husband, and the greater part of the mortgaged property was sold in execution, and the equity of redemption thereof was purchased by the mortgagee (the defendant). The sons were not parties to the suit in execution proceedings. The sons afterwards brought the suit claiming that not having been parties to the suit, their interests were not affected by the sale and prayed for redemption.

Widow sued in her representative character.

It was held that Courts in determining the effect of an execution sale must look to the substance of the transaction. The question was whether the debt for which the property was sold was a joint family debt, and whether it was the equity of redemption in the entirety of the mortgaged property that was offered for sale, bargained for, and intended to be bought. It was obvious that, if the sons had been parties to the suit in which the decree had been passed, they would have appeared by their mother and guardian, and there was no reason to suppose that anything would have been differently done in the suit if she had been described as their guardian instead of being treated as the representative of the estate. Under these circumstances the sons were held to be substantially represented in the suit, and the sale and proceedings therein were treated as valid, unless the sons were able to show either, that their father's debt, which was the foundation of the decree, was of such a nature that no liability arising from it could attach to the family property, or, if they failed in that, they might show that the entirety of the family property was, in fact, not sold. The learned Chief Justice of Bombay after reviewing a series of leading cases in India from the very earliest times up to a recent date, came to the conclusion that the mere formal defect in the frame of suit or in the proceedings will not stand in the way of the

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1. *Devji vs. Sambhu*, 24 Bom., 135.

substantial decision arrived at. As a matter of fact, the High Court adjourned the hearing of the appeal in order to examine the records of the original suit to see if the widow was sued as the representative for the time being, of the estate. But as the old records of the case were missing, the Court arrived at the conclusion from the admitted facts that she was sued as the widow of Gannu, and that she was proceeded against for her husband's debt. The connected and the analogous rulings referred to at length by the learned Chief Justice were cases of joint Hindu families, widows with minor sons, Mahommedan families, and the like. The sole criterion to determine whether the previous suit was a representative one is to apply the test whether the suit purported to be for a debt of necessary purpose of the family or not. If it was, the Court will presume that the decision had the representative character. The test stated above was applied to another case<sup>1</sup> in which the deceased widow was concerned in a litigation with a stranger. In that case, a Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the cost was taken out, the decree-holder sought to take out execution against the next heirs of her deceased husband. It was held, as a matter of fact, that the widow did not in her suit seek to recover any interest personal to herself, but she contracted the judgment-debt in the effort to recover a portion of her husband's estate, to which in its entirety the next heirs of her late husband had succeeded. This was sufficient to make the whole estate liable, and to entitle the decree-holder to satisfy the decree against the legal representatives of the late widow's husband under S. 50 of Act V of 1908. It has been pointed out that to make the decree have the representative character, it was essential that it should be stated in the decree whether the decree was a personal one, or against her as representing her deceased husband. But I apprehend the stamp of representation is not ordinarily affixed on the face of the decree. It is necessary to gather the facts for deducing the representative character of the suit and the representative capacity of the party from the body of the proceedings *ab initio*.

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<sup>1</sup> Ramkishore vs. Kallykanto, 6 Cal , 47p.

It is a question whether a representative suit is closed or abates upon the death of the representative party. The party may be the plaintiff, or he may be the defendant. This question has some-

Representative suit.  
No abatement.  
Finality.

times occurred when the litigating party is a Hindu widow. In a decision of the High Court of Calcutta<sup>1</sup> it has been laid down that on the death of a Hindu heiress, after

institution of a suit to recover property belonging to her deceased husband, the reversionary heirs of the husband are her legal representatives within the meaning of Order XXII, Rule 3(1) of the first Schedule of Act V of 1908. The same principle has been followed in other cases.<sup>2</sup> In this view of the matter it is difficult to follow the decision<sup>3</sup> of the Allahabad Division Bench published in the year 1908. This has been discussed in a previous Chapter. There is absolutely no distinction in the heritage claimed by a Hindu widow and that by a daughter. The crux in such cases lies in the fact that there is a finality arrived at by the result of decisions in such representative actions, provided, of course, there has been a fair fight and a fair trial in such cases. This is the result of the leading Privy Council decisions.<sup>4</sup>

As said above, the test of a representative suit is deducible not from anything to be found on the face of the decree but from the context of the whole proceedings. Nevertheless, the decision in

Representative action  
and decision, question  
open, when ?

such cases is not like judgments *in rem*. It is always an open question to a third party, such as the reversioner, the son, the coparcener, or the like<sup>5</sup>, to challenge the representa-

tive character of the previous suit and the representative capacity of the party therein. In an Allahabad case,<sup>5</sup> the land had been sold in execution of a decree against a joint brother. The tenant brought an interpleader suit under S. 88 and Order XXXV, Rule 1 of Act V of 1908 (S. 471 of Act XIV of 1882), because the other

1. Premmoyi vs. Preonath, 23 Cal., 636.

2. Musala Reddi vs. Ramayya, 23 Mad., 125, Tribhuwan Sundar Kuar vs. Sri Narainsingh, 20 All., 341.

3. Balak Puri vs. Durga, 30 All., 49.

4. Harinath vs. Mathormohan, 21 Cal, 8 (P. C.) Katama Natchiar vs. Raja of Shivaganga, 9 M. I. A., 539.

5. Maharaj vs. Chhitar, 30 All., 22.

joint brother asserted his right to receive the rent due by the tenant. The dispute was between the claimant for rent and the purchaser at auction. It will appear from the report of the case cited, that the questions whether the two brothers were joint or not, whether the judgment-debtor in the previous suit was the manager or not, and whether the debt for which the decree had been passed was for legal necessity or not, had to be tried *de novo* on their merits in the case.

On the authority of the foregoing rulings on the subject of mortgage of joint or ancestral property by the father, the *kurta* or the managing coparcener of a Mitakshara family, I feel bound to remark that after completion of sale or foreclosure on foot of the mortgage in which the mortgagee had omitted to implead the sons, grandsons, or the like, of the mortgagor, it is not an easy-going business that the omitted parties should, as a matter of course, be permitted to reopen the completed and the closed transaction of mortgage and to institute a fresh suit for the redemption. I cannot readily lay my hand on a parallel case in the reported decisions of this country to resemble the main outlines of two recent decisions passed by the Judicial Commissioners at Nagpur.<sup>1</sup> The facts of these cases show that the mortgages by conditional sale had been effected by the senior adult members of the Mitakshara families. In one case there were three mortgagors who were the fathers and the grandfathers of other eight members of the family who subsequently sued for redemption. In the second case seven senior and leading members of the family were the mortgagors. In both the cases ancestral properties were mortgaged. There was of course no pretence in either case that the claimants for redemption were not interested in the hypothecated lands. In both the cases the mortgagees sued the mortgagors alone without impleading the other coparceners of whose existence the mortgagees had notice at the time of their suits. In both the cases, again, execution proceedings for foreclosing the mortgages had been taken and the sales made absolute. It appears from the facts reported that

Redemption by sons  
after foreclosure.

Comments on C. P.  
Rulings

1. Dindayal vs. Sheoraj, 2 N. L. R., 116. Ghasiram vs. Jhingwa, 4 N. L. R., 168.



the troubles began from the moment when the foreclosure purchasers got the orders absolute for sales in their favour. The facts of the cases further show that the tug-of-war for seizing and snatching possession went on for several years between the unlucky foreclosure purchasers on one hand and the non-impleaded coparceners of the mortgaging families on the other. During this long interval of time what actually took place, the reports of the cases do not show. But they indicate beyond the shadow of a doubt that the feelings between the parties were so far embittered that after the lapse of several years the coparceners who had been omitted from the array of parties in the previous mortgage suits felt compelled to institute redemption suits with a complicated scheme for accounts relating to interest for the mortgage money and mesne profits debitable and creditable according to the circumstances of possession and dispossession. In both the cases the stumbling blocks of the foreclosure decrees that had been passed against the real mortgagors presented obstacles of no mean order to adjust the equities between the parties. But from the proceedings of both the cases it is clearly deducible that the plaintiffs had no case to advance against the mortgages founded on the ground of want of legal necessity for the loans contracted by the *kurtas* of both the families or that the said loans were tainted with immorality. Consequently they fell back upon the equities which they thought they enjoyed, namely, the equities to redeem the mortgages. It was very easily conceded by the defendants in both these cases that those equities of redemption had not been completely exhausted by the previous actions. Probably the foreclosure purchasers were anxious more for their money than for the property they had bargained for: and the Courts throughout did not consider it worth their while to question the proceedings on the ground that the remedies of the plaintiffs were, to all intents and purposes, exhausted by the previous foreclosure proceedings. I have not a word to say against the legality of the decisions in these two cases. Technically and theoretically they may be absolutely correct so far as they go. But in the provinces from where these two rulings come it may not be regarded as a rational line of procedure to allow fruitless luxuries of litigations based on extremely technical considerations of law. If it be a fact clearly deducible from the authorities that exist, that mortgage actions

terminating with foreclosures or sales against the ancestors of parties are of a representative nature and if the titles created thereunder are not capable of being disturbed unless a strong case of moral or legal support is made out against them, I fail to see how on principle the aforesaid two cases decided at Nagpur can be supported for their inception and result.

In another important point of view the institution, trial and decisions of the aforesaid two cases of Nagpur are fit to be deplored. It is widely known in this country that since the decision of the Privy Council in August 1908 ordinary suits for sale under mortgage are limited to the period of 12 years from the date of the cause of action, while the Legislature in Act IX of 1908 have retained the unbroken continuity of 60 years' rule for claims for redemption.

Such being the state of the law it is easy to see the hardships that might result from allowing redemption suits by sons and grandsons simply on the ground that the original sale proceedings were held against a remote ancestor without all the then-existing coparceners being impleaded as parties. Not only will the vested rights and interests in properties be ruthlessly disturbed, but the procedure will be in defeasance of the most important principle which ordinarily underlies an action on a mortgage executed by the father that the transaction and the suit are of a representative nature. Serious complications may arise if on the faith of absolute title, created by foreclosure or sale, the purchaser and his heirs or assignees make improvements in the properties acquired by the execution proceedings. It is of course otherwise if the original transaction of mortgage were one sided in its nature or if it were such as created no obligation of any sort on the claimants. The burden of making out an exceptional case of this sort should, I think, be primarily cast on the plaintiffs before they are permitted to sue for redemption of mortgages which ended in foreclosure or sale in a suit properly framed for the purpose. The bare omission to implead the entire household of the mortgagor is *per se* not so serious a formal defect, according to law and authorities, as to vitiate the transaction. For properties so transferred, say a half or a quarter of a century ago, that have deteriorated in value, the

Certain redemption suits by sons and coparceners. Act IX of 1908.

descendants of the original mortgagor with so-called vested rights in the properties will never dream of redemption on payment of the original debt with interest accumulating over a series of years. But on the other hand, if, as it ordinarily happens, the said properties have considerably increased in value and in their usufruct, the temptation to recover the estate with mesne profits, would lead to endless litigations, disturbance of titles and serious injuries to parties. Such a sad result cannot be in the contemplation of justice and equity and it cannot legally be attributable to the adjective law which section 85 of Act IV of 1882 embodied.

It would seem to follow as a plain deduction that in matters where the right to sue abates or the cause of action does not survive, as in the

case of the death of a tort-feasor, the liability of the son for the demand arising out of the tortuous act does not exist. On this subject the text of Vrihaspati is as follows:—"The sons

Son's liability for tortuous act of father: Texts of Vrihaspati and others.

may not be compelled to pay sums due by their father for spirituous liquors, for losses at play, for promises made without consideration, or under the influence of lust or anger, or sums for which he stood surety, or a fine or a toll, or the balance of either (of these)"—Ch. XI, 51. Numerous other texts containing more or less identical or analogous matters would be found in a well-considered judgment, on Reference, of Parson, C. J. and Ranade J. of the Bombay High Court.<sup>1</sup> It has been pointed out that general principles of texts of this nature are always controlled by special texts or exceptions wherever they may occur. But there are in the texts certain matters which are of universal and unexceptionable application. Among these the question of damages for tortuous acts of all sorts committed by the father occupies the foremost rank. It may indeed be very hard to classify such acts under the category of illegality or immorality. But, as indicated in the aforesaid text, these two do not cover the whole ground to exonerate the son from liability. It would appear that this is so, apart from the question of benefit or no benefit to the joint estate of which the father was the head. A recent decision of the High Court of Bombay<sup>2</sup> has, in a case of an apparently tortuous act by the deceased father, given (I fear) an undue weight to the question of no benefit to the estate as

1. *Tukarambhat v. Gangaram*, 23 Bom., 454.

2. *Durbar Khachar v Khachar Harsur*, 32 Bom., 348.

the main reason for relieving the son from liability. The report of the case is silent as regards the fundamental discussion wherefrom the question of benefit or otherwise could have been reasonably deduced. The father in the case cited erected a cross-bank impeding the water-course against the irrigation of the riparian cultivator's field. One would ordinarily suppose, this was done not as a child's frolic or a madman's aimlessness, but the tort to the neighbour must have been done with the intention to benefit the crops of the tort-feasor. Curiously enough nothing in the shape of a plea, evidence or finding in this respect appears in the Report. The plaintiff obtained a decree which in the father's life-time was executed by attachment of family property; on the death of the father the Court executing the decree followed the well-known, though exceptional view which prevails in that presidency<sup>1</sup> and entertained the son's objection to non-liability to pay the debt, though it had culminated in decree, attachment, and sale of the property during the father's life-time. The sole question therefore before the Court was whether the son was liable to pay such debt and was entitled to reverse the decree and the eventual results thereof. Following the texts mentioned above, the High Court answered the question in the affirmative. The learned Judge Knight observed: "Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices. Applying these maxims to the case before us, we must conclude that the son is not liable under the decree. His father's act in obstructing the passage of water to the decree-holder's lands may not have been illegal in the usual sense of the term, that is to say, it may not have been committed in contravention of any express provision of law; but the result of the suit shows that it was wrongful, and for a liability so incurred the son cannot be held answerable when the estate that has come to his hands has derived no benefit from the act."

The aforesaid quotation appears to me a bit of puritanic extension of the actual principle in the interest of the son. It is undoubtedly

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1. *Umed v. Goman*, 20 Bom., 385; see also *Ibid*, 338.

sound that the estate in the hands of the son is not liable for the tortuous actions of his deceased father or for damages for acts against law or morality. So far certainly the decision is perfectly correct. But it is absolutely beside the mark, in view of the fact that the judgment-debt had actually been realized, and remained only to be paid to the decree-holder, when the precious doctrine we are now considering was cleverly introduced to reverse the whole execution proceedings. We might here well contrast the case with the decision<sup>1</sup> of another bench of the same High Court where the question of son's liability to answer the decree for damages against his father cropped up in another, but questionable, form. It was to consider whether the son's right to appeal against the decree which had been passed against his father lapsed and abated or whether the right survived the judgment-debtor. The decision was in favour of the latter. The Report shows that the decree-debt had been realized before the father instituted the appeal: on his death the son wanted to prosecute the appeal not on the ground of non-liability for the damage-decree against his father, but because it was contended that the decree was wrong on its merits. In fact, the son wanted to continue the appeal which his father instituted. Where was his need to do so if in accordance with the view of the later Bombay decision quoted above and pushing it only one step farther, the son could by way of restitution, as it were, recover the amount of damage received by the decree-holder? But contrast again another case of Madras<sup>2</sup> where under similar circumstances as in the earlier Bombay case the son's right of appeal after his father's death against a decree of damages for malicious prosecution was affirmed after a considerable contest before the High Court. Where, I again ask, was the need for such a contest when in accordance with the principle recognized and well-established throughout, such a decree is not recoverable from the son out of the property obtained by him by right of succession or survivorship? It appears from the report of the Madras case that the decree was not executed and the debt realized in the life-time of the father.

It is neither safe nor certain to deduce the theory of son's liability on the utilitarian or ultra-puritanic views of his father's transactions.

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1. *Gopal v. Ramchandra*, 26 Bom., 597.

2. *Paramen v. Sundararaja*, 26 Mad., 499.

In this connection we have no right to travel beyond the stated wordings of the texts. While attempting to render those texts into foreign language one ought to be strictly on his guard not to introduce new thoughts or ideas either to extend or derogate from the scope of the texts. For instance we find, in the decision of Knight, J. quoted above, expressions like father's *failings, follies, and caprices*. He has further pointed out that his transaction must be that of a *decent and respectable* man. In all humility, I must say this is teaching impiety to the son against the teachings of the *Sastras* and the memorable principles laid down by the Privy Council in *Giridhari Lal Kantoo Lal's* case. Most if not all the epithets used by the learned Judge are not exactly traceable to any of the clauses of the texts of Vrihaspati and Ushana quoted in the decision. Our ancient sages did not barely formulate general precepts without commentaries and specifications. In their notes and subordinate *Slokas* every word and passage of their injunctions have been fully explained with examples. Take for instance the question of father's suretyship in relation to son's liability therefor. It is not an uncommon question which comes up for the decision of our Courts of law. If we are led away with the isolated thought of any kind of father's suretyship creating no liability on the part of the son or the assets in his hand after the father's death, we are likely to fall into the error which the learned District Judge in a Bombay case<sup>1</sup> had committed when he referred to the High Court the question recommending exoneration of the son's liability. The learned Judges put forward the several texts on the subject of father's suretyship and pointed out the circumstances under which the son's freedom from liability has been enjoined. Those circumstances partake more or less of the nature of reckless or partial obligations for which the son cannot reasonably be made liable. It was at the same time pointed out that in order to make the son liable the father's suretyship need not be for the benefit of the family or the estate.<sup>2</sup> The new Code of Civil Procedure (Act V of 1908) has introduced a new definition, S. 2(11), by interpreting

1. *Tukarambhat v. Gangaram*, 23 Bom., 454.

2. *Jayanti v. Alamelu*, 23 Mad., 45 (at p. 48). *Chettikulam v. Chettikulam*, 28 Mad., 377.

Decree against father :  
Summary of views.  
'Legal Representative,'  
New C.P.C., V of 1908

the meaning of the expression 'legal representative' which is used in many parts of the Procedure Code. Great importance must be attached to this expression for its uses in the Chapter on Execution of Decree, wherein 'representative' and 'legal representative' have been promiscuously used: for all practical purposes they mean one and the same thing. The new Code, however, does not make the slightest attempt to bring about anything like reconciliation between the views of all the High Courts of India against those of the High Court of Bombay, in respect of execution of money decree that was passed against the father being carried on against the property in the hands of the son. The discrepancy, it must be noted, relates not to the self-acquired property of the father or to the property of a Dayabhaga father, but it is restricted solely to the joint and ancestral properties of the Mitakshara families. In a Calcutta case<sup>1</sup> an attempt was made to differentiate, from the general view on the subject which prevails in the rest of India excepting Bombay, the case of an impartible estate belonging to the father which descends to the son by the rule of primogeniture. But even this attempt was not allowed by a subsequent ruling<sup>2</sup> of the same High Court. In many other recent cases<sup>3</sup> eminent lawyers well-versed in Hindu Law strenuously argued the principles laid down in the Bombay case—I. L. R., 20 Bom., 385—for the acceptance of the Judges. But the learned Judges felt unable to follow the Bombay view not merely in deference to the earlier views of the same and of the Allahabad and Madras High Courts, but because they considered that the Privy Council decisions did not go so far as to make the surviving son to represent in law the estate of his deceased father. The Lords of the Privy Council have simply laid down the general principles under which the son has to bear the burden of the proper debts of his father; but it was not in their Lordships' power to abrogate the doctrine of merger of estate by survivorship. In none of the decisions of the Privy Council which are so often quoted in connection with this subject is it anywhere laid down that the interest of the father

1. Ram Das v. Tekait Braja Behari, 6 C. W. N., 879.

2. Kali Krishna v. Raghunath, 31 Cal., 224.

3. Vide Juga Lal v. Audh Behari, 6 C. W. N., 223; Chander v. Sham, 33 Cal., 676.

in the joint or ancestral estate devolves on the son as his assets. In this respect, we must consider, the Bombay High Court has given an undue weight to the views of the Privy Council departing from the strict letter of the Mitakshara law. Now that we have got a new definition of the expression 'legal representative' in the Procedure Code now in force, we cannot but think that the Bombay Court should revise their views on the subject in consonance with those that prevail in the rest of India. We cannot say that the altered language in which the old section 244 has made its appearance in the present code will render any help to the holder of a money-decree against the Mitakshara father to enable him to proceed against the estate of the son, unless the decree was one that was passed on a mortgage by the father, or unless it had been perfected by an attachment of the property in the life-time of the deceased judgment-debtor. I refrain from quoting the recent analogous rulings of other High Courts because they have been amply quoted in the Calcutta decisions noted above.

It has been repeatedly pointed out that considerable difficulties, complications and troubles can be avoided if sufficient care is taken in the framing of the suit and the pleadings. These occur when the question arises who is the legal representative of the deceased judgment-debtor. It is very easy to find in the Reports of cases illustrations of suits and decrees against the manager or the widow in his or her representative capacity. The rulings show that the inference as to the representative character or otherwise is not always safely deducible from the wordings in the decree alone. The executing Court is at liberty to look beneath the surface and derive materials for a proper conclusion in this respect. It is only when the Court is satisfied that the party sued or was sued in a representative character that it can make the person, on whom the estate devolved on the death of the said party, chargeable with the decree. But when can you say that a party sued or was sued in his or her representative capacity? That is a pure question of fact. It may be enough, if a person sues or is sued as the *Karta* or manager of a joint Hindu family, that his character as such *Karta* or manager is a representative one. But a widow must by the bare description of her name appear in the plaint with the name of her deceased



husband. Therefore in each case we have to go through the records of the proceedings and see from the dealings whether the suit by or against the party was a *bona fide* one and in the interest of the estate.

In reference to joint or ancestral estates in the possession of a father and his sons, there is a broad line of difference between the views prevailing in Bengal proper and in the rest of India. In Bengal, the power of the Hindu father is much larger. The honour of inaugurating this departure is attributable to Jimutavahana. But before the advent of this renowned jurist under a Bengal king, the ground was paved by a gradual evolution of thought in Bengal, and the consummation was achieved by the commentator, as it was the immediate result of spontaneous growth of legal conceptions in that part of the country. In another early ruling<sup>1</sup> it was held that a Bengalee father can sell or pledge, without his son's consent, immoveable ancestral property, and he can, by will, gift, etc. prevent, alter or affect the succession to such property. But in the rest of India, while the same may be said of his powers regarding his acquired estate, the law is different as regards his power of alienation, without consideration (will or gift) or without legal necessity, of the ancestral estate. But the accepted doctrine for the whole of India, deducible from the texts and the authorities, is to recognize the validity of father's alienation of all kinds of property for legal necessity.

The above-quoted ruling of the High Court of Calcutta lays down a broad departure from the current of views which prevail in the rest of India. We are bound to place a great weight upon the pronouncements of the High Court of Bengal from before the commencement of the last century and on the authority of the repeated decisions of the Privy Council which generally speaking concur in one significant respect that at any rate in the Province of Bengal under the sway of the Dayabhaga doctrines, father's alienations of estates of all sorts, acquired or inherited,

Bengal father *vs.* Mitakshara father. Legal necessity.

Father's power over ancestral estate and legal necessity.

1. *Hurolal vs. Kripamoyee*, 3 W. R., 227.

are not at all controlled by the restrictions of legal necessity. There are indeed stray cases and stray texts and their interpretations which seem to favour the views that the needs of family subsistence, maintenance of sons, and fairness of partitions among children, have considerable moral bearing to influence the decisions of Courts. But when we find that gifts *inter vivos* to one son in preference to another and bequests to the exclusion of children have in Bengal always been supported for about a century, and a half, there is absolutely no reason why we should stand aghast by setting up a comparison of the Bengal doctrines with the prevailing views in the rest of India. It is however noticeable that in some of the recent commentaries on Hindu Law, particularly in the well-known book by Babu Golap Chandra Sarkar, there are passages and quotations from the original texts which go to show that a Bengal father possessed of ancestral estate has to respect the legal necessities of the family before he can be permitted to make a wholesale alienation of the estate. The learned author has gone the length of comparing such a father with a Hindu widow inheriting from her husband. But, with great respect for the original thoughts and researches which the eminent lawyer has brought to bear upon his book on Hindu Law, we cannot but agree with the summary on the subject by Mr. Mayne in his celebrated work on Hindu Law and Usage, 7th Ed., para 406. The gist of the whole law on the subject must be held to be contained in the brief note described as a letter in 3 W. R., 227 but which is otherwise styled as a certificate communicated by the Judges of the Sudder Dewany Adawlut to the late Supreme Court of Calcutta in 1831. The certificate ran thus: "On mature consideration of the points referred to us, we are unanimously of opinion that the only doctrine that can be held by the Sudder Dewany Adawlut, consistently with the decisions of the Court and the customs and usages of the people, is, that a Hindu, who has sons, can sell, give, or pledge without their consent, immoveable ancestral property, situated in the province of Bengal; and that without the consent of the sons, he can, by will prevent, alter or affect their succession to such property." Mr. Mayne considers the above quotation to represent the current Bengal view on the matter as settled by authorities. It is useless to consider it

'inexplicable.' We have no right to explain away or to try to find loopholes in such a hard-and-fast exposition of the law of the Bengal School on the subject, because we are bound to admit that the said exposition had the support of all, or at all events of the majority, of the eminent Bengal Pandits who were consulted by the Judges. Such being the case there is hardly any scope to introduce the principles of legal necessity to control the dealings by the father of the estate in his absolute dominion.

Subject to the peculiarity respecting the alienations and transfers of joint family estate including gifts and bequests which the Dayabhaga School in Bengal has practically sanctioned in favour

Mitakshara father and of the Hindu father, there appears to be no distinction throughout the country in respect of the son's rights to protect his interest in the joint or ancestral estate by proving the exceptional nature of the consideration for which the alienation is effected. The question of consideration for transfer by the Hindu father connotes the distinction of the views of all other schools of Hindu Law from those that prevail in Bengal. In other words, in no other part of India the Courts will uphold the father's transfer without consideration of joint or ancestral estate by way of gift or will. But at the same time it is clear from the authorities that exist that the so-called legal necessity for the transactions of alienations by a Hindu father in other parts of India is a matter of negative importance. The principle that has now been accepted throughout the country is that it is not obligatory on the father or his alienee to prove that there was any *legal purpose* for the alienation by the father, but that it is absolutely incumbent on the son to prove the exceptional, *i.e.* immoral or sinful, nature of the consideration for the alienation. This is what I call the *negative value* of the doctrine of legal necessity in such cases. There have however been considerable differences of views in the Courts of Mitakshara India as regards this particular matter. For instance, in the decision<sup>1</sup> of the Allahabad Court already noticed, the learned Judges have practically ascribed to the father the status of a childless widow, and held that if in a case between the father's alienee and his son wherein the

1. *Jamna v. Nain Sukh*, 9 All., 493.

latter impeaches an alienation of ancestral estate by his father there be no evidence on the part of the alienee that the transaction had the support of legal necessity, *i.e.* some kind of family want or purpose justifying the alienation, the son is entitled to succeed. It is clear that this view cannot be supported in its entirety. It has been pointed out<sup>1</sup> that the aforesaid Allahabad case was founded on a Calcutta ruling reported in I. L. R., 2 Cal., 438 and that the latter has been reversed by the Privy Council. On this ground we find that a later ruling<sup>2</sup> of Allahabad and a decision<sup>3</sup> by Sargent, C. J. have expressly dissented from the aforesaid Allahabad ruling. We find it laid down in a decision<sup>4</sup> of Madras per Boddam and Bhashyam Ayyangar, J.J. that it is now established by a uniform course of decisions that a debt incurred by the father which is not shown to be illegal or immoral is, even during the life-time of the father, binding upon the son's interest in the family property and any alienation, voluntary or involuntary, made to discharge the debt is binding upon the son. It is of course needless to say that the son by proving the impurity of the debt is able only to protect his own interest, and not the interest of the father which is covered by the alienation in question.

The foregoing authorities seem to lay great stress on the existence of a *bona fide* antecedent debt. We cannot, following the views of some early cases considered in a preceding page of this chapter, regard the subject of antecedent debt and the concurrent debt or cash consideration as mere quibbles or as controvertible expressions. That these two things are not the same, is abundantly clear from the words themselves. We must remember the fundamental distinction between the doctrines of the Dayabhaga School and the views that prevail in the rest of India. In the latter the supreme dominion of the father over the joint or ancestral estate in which the son has a *pro tanto* or vested interest, is not recognized to the extent of enabling the father to alienate such property without consideration. It would therefore follow as

Legal Necessity partially recognized for cash consideration as against antecedent debt.

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1. Khalilul v. Gobind, 20 Cal., 328 (at p. 341).
  2. Debi v. Jadu, 24 All., 459.
  3. Mehendale v. Kashinath, 14 Bom., 320
  4. Chidambara v. Koothaperumal, 27 Mad., 326.

a corollary to the above that if the consideration for transfer of such property be for present cash payment for which there is absolutely no family need or no kind of earthly purpose, or if the alleged consideration be grossly inadequate having regard to the value of the estate, or if it be a bare blind or pretence to show justification for the transaction, the son, it would appear, has a right to step in to protect his interest in the estate. This has been very pointedly explained in a decision<sup>1</sup> of the Madras High Court. The learned Judges have made a very careful and elaborate analysis of the decisions of other High Courts on this point; and they have clearly stated as their view that we must respect the difference between a *bona fide* antecedent debt and the present cash consideration for the transfer by the father of the joint or ancestral family property. Thus we have ample authority to subject the transaction by the father dealing with such kind of estate to the scrutiny of a rational view of legal necessity which does not purport to detract or derogate from the privileges of a Hindu father. In spite of the strong language of some of the later rulings of Courts denouncing the judgment of Edge, C. J. in I. L. R., 9 All., 493 as bad law, we find it stated in a much later ruling<sup>2</sup> of the Allahabad High Court that "in a case in which a creditor is endeavouring to establish a claim under a simple hypothecation bond given by a Hindu father, having a limited interest only, against his sons, it appears to us to be not unreasonable to require proof on the part of the creditor that, before he entered into the transaction, he at least made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family. But it is not at all clear in our opinion that the decisions to which we have referred did impliedly overrule the decision in *Jamna v. Nain Sukh*, I. L. R., 9 All., 493." Further, it has been pointed out that you cannot stop the mouth of the son from contending that behind the so-called antecedent debt for which the father has alienated property there were illegal debts for which the alleged antecedent debt was substituted. To this extent therefore we have to recognize the equitable principles of legal necessity in the qualified sense in which that expression has

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1. Venkataramanaya v. Venkataramana, 29 Mad., 200, F. B.

2. Maharaj v. Balwant, 28 All., 508 (at p. 541).

its application in the domestic economy of a joint Mitakshara family of a father and his sons.

By a series of rulings, the Allahabad High Court has laid great stress on the framing of the suit, the array of the parties, and the nature and the terms of the decree in proceedings against the father for debts incurred by him. It has been held<sup>1</sup> that if the decree is obtained against the father, and the holder of the decree, in execution, attaches the joint family property, belonging to the father and the sons, the latter have a right to object to the attachment and on failure to get their interests released, to sue and to show that the incidents of the suit, decree, and attachment could not affect their interests, and, on that footing, to ask that their interests should be exempted from the threatened sale in execution. For the time being, it would appear, as if the Court lost sight of the legal (no longer moral, as under the orthodox texts) obligation of the sons to discharge their father's debts with the exception of those incurred for immoral purposes. But, in a later ruling before a Full Bench of the same High Court<sup>2</sup> it has been laid down that the sons were liable to be sued along with their father upon a mortgage bond given by the latter alone charging the joint-family property though the consideration was mostly antecedent debt neither necessary for the family nor immoral. The Court enjoined the necessity of impleading the sons to reach the entire estate. As a necessary sequence from the above, a Divisional Bench of the same High Court<sup>3</sup> have ruled that if the father, judgment-debtor, dies after decree, the holder of the decree cannot implead the son in execution and attach the property, but that he must bring a new action to make the sons and the estate in their hands liable. The Madras Court has virtually adopted the same view;<sup>4</sup> and it was held that the decree against the father charging the joint ancestral estate in his hands, cannot, after his death, necessarily create an obligation against the son so as to entitle the decree-holder to proceed by way of execution. He is bound to sue on the decree, and *then* the son's liability for the debt and therefore the

1. *Ram Dayal vs. Durga Singh*, 12 All., 209. Overruled by *Karan Singh vs. Bhup Singh*, 27 All., 16.

2. *Bhadraprasad vs. Madhablal* 15 All., 75 (February 1893).

3. *Luchminarain vs. Kunjilal and others* 16 All., p. 449.

*Ariabudra vs. Dorasami* 11 Mad., 413.

liability of the estate in his hand can be adjudicated. These two rulings (I. L. R., 11 Mad., 413 and I. L. R., 16 All., 449 cited above) have however been expressly dissented from by a later Bombay ruling.<sup>1</sup> There it has been laid down that the direct logical sequence of the P. C. decisions is to hold, that such decree may be enforced against the sons after the father's death, that the ancestral property in their hands will be liable whether the debt was necessary or not, and that the only thing that the sons can do to save their interests, is to show, in the execution proceedings, that the debts were corrupt and immoral. The same principle has been applied by the Bombay High Court to a Mahomedan family.<sup>2</sup>

After all, the discrepancy, noticed above, is one of procedure and in the application of the adjective law. The principle of legal necessity between the father and the son in respect of debts incurred by, and decreed against, the former has been respected without any material difference. The matter must however be regarded as completely set at rest by their Lordships of the Judicial Committee in *Bhagwat v. Girja*, I. L. R. 15 Cal., 717, which, after following the earlier rulings of *Girdharilal*, *Suraj Buns Koer*, and *Madan Mohan's*, has laid down that the sons, whether parties to the decree or not, wishing to annul an auction sale, or a private alienation, to the extent of their shares, must show that the debts for which the alienation was effected, were immoral and illegal; that in this respect, the position of the sons is quite distinct from that of other relations; that in execution of the decree against the father, the whole interest in the property passes; that, the notice of objection at the time of the sale by the sons is immaterial, and that, the purchaser is not bound to prove the necessity for the loan or his own enquiry about it.

It is not enough for the son to show that the transaction was a most imprudent one (1 C. P. L. R., p. 43 already cited), or that there was absolutely no necessity for the debt or the alienation, the income being large to meet all wants. He must establish that the father was a man of wasteful and dissipating habits. Then again, the connecting link must be supplied, and it must

General proof by son  
unavailing. Connecting  
link.

1. *Umed Hathising vs. Goman*, 20 Bom., 385.

2. *Davalava vs. Bhimajee*, 20 Bom., 338.

be clearly established, that the loan was applied to an immoral or illegal purpose. It is, of course, impossible, as it is not necessary, "for the son to trace out the items of the expenditure and prove them."<sup>1</sup> The *onus* of proof, in this respect, it has been held, is not shifted from the son by more general proof of the father's immoral habits.<sup>2</sup> In 1892 a Full Bench of the Allahabad High Court decided, that if the bond or the decree indicated that it barely concerned the father, but that in reality the whole property or the entire interest is alienated by private deed or execution of decree, the son cannot assail the alienation without discharging the *onus* that lies on him: otherwise, the decree or the deed will carry the presumption that the debt was a necessary one.<sup>3</sup> The parties in *Khalilal v. Govind*, I. L. R., 20 Cal. 328 were members of a prosperous family in Behar, governed by the Mitakshara Law. The following three elements were present in the case, (1) there was no proved necessity for the loan, (2) on the other hand, there was no proof of immoral or illegal expenditure, and (3) there was no proof that the lender made any enquiry as to the necessity for the loan. It was moreover found that the expenses that immediately led to the indebtedness were "imprudent," "reckless," and "unreasonable." Nevertheless they were held to be antecedent debts,—debts antecedent to the transaction, *i.e.* debts and cash taken prior to the execution of the deed within the meaning of the Full Bench and the P. C. decisions cited. After reviewing numerous authorities, the H. C. of Calcutta held that the mortgagee was entitled, in a suit against the father and the sons, to a decree directing the debt to be raised out of the whole ancestral estate, including, of course, the mortgaged estate. If the sons objected to the sale of their shares and their objection was notified at the time of the sale, and ostensibly the interest of the judgment-debtor was put up to sale, the Bombay High Court held that the whole interest would pass.<sup>4</sup> In *Sahapathi v. Somesunderam*, I. L. R., 16 Mad.,

1. *Narayan vs. Jugunnath & Co.*, 4 C. P. L. R., 29 commented on and followed in *Jawaborsing vs. Mohanlal*, 6 C. P. L. R., 140 of also *Bhowani Bux vs. Ramdas*, 13 All., 216.

2. *Chintaman Rao vs. Kashinatho*, 14 Bom., 32, *Vasudev vs. Krishnaje*, 20 Bom., 534.

3. *Pemsingh vs. Partabsing*, 14 All., 179, F. B. Contrast this with 15 All., 75 F. B. already cited.

4. *Cooverjee vs. Dewsey*, 17 Bom., 718.



Father and son; peculiar Madras view.

76, strangely enough, the learned Judges of the Madras High Court gave a peculiar construction to the phrase 'antecedent debt,' and held that as the interest of the son in his mother's womb in the ancestral estate is vested from the moment of his conception, he was entitled after birth to *recover his share from a bona-fide purchaser for value from his father on payment of the debt.* We are unable to reconcile this ruling with the universally accepted view on the subject. A later ruling<sup>1</sup> of Madras has considered that the theory of refund of value to enable the son to recover his share as stated in I. L. R., 16 Mad., 76, was attributable to the printer's devil, and that it did not appear in the original judgment of the Court. But the rule of law that still continued to be followed in Madras was to the effect that to justify a sale or mortgage by a father so as to bind the son's share of the ancestral estate, there must be *a debt*, that is, an antecedent debt prior to the mortgage or sale. In a Madras case, the facts were that the father borrowed the money not prior to the mortgage, but only at the time of the loan. The Madras Court held that the creditor was entitled to a money decree only, (the simple nature of the debt presumably not having been established), and not to the charge on his share for the debt. It was held, however, that the plaintiff had right to proceed against the son's share in execution of the decree, treating it as a mere money decree only.<sup>2</sup> Other Courts do not place much reliance on this nominal distinction. In *Pran Krishna v. Jadu Nath*, 2 C. W. N., p. cclxxviii, the mortgage by father was effected mainly to discharge an antecedent debt, only a small part of the consideration having been received in cash. With respect to the latter, the learned Judges of the High Court remarked that the cash payment not being shown to have been for any immoral purpose, and the sons being minors, the case came within the provision of the Mitak., Chap. I, Sec. 1, para 29, and the mortgage was valid and binding. It would appear that there has been a uniformity of views on the subject

1. *Virabhadra vs. Gurusankata*, 22 Mad. 312.

2. *Sami Ayyangar vs. Ponnammal*, 21 Mad. relying on the earlier views of the same High Court, 28, as per *Srinivasa vs. Ponnammal*, and *Chinaya vs. Perumal*, 13 Mad., 51; apparently not following *Khalil v. Gomed*, 20 Cal., 328.

among the High Courts of India. In *Chudambara v. Koothaperumal*, I. L. R. 27 Mad., 326, the decision, quoted above, in 21 Mad., 28, was referred to in argument to support the view that it was necessary to prove that the debt of mortgage by father should have been antecedent to the mortgage. But the learned Judges held that the authority of that decision was shaken considerably by two later decisions<sup>1</sup> of the same High Court which laid down that the only criterion for the son to escape liability was that the debt of mortgage was immoral or illegal, and that there was no distinction at all in principle as to whether the mortgage was given by the father for an antecedent debt or for a debt *then* incurred. This latest decision of Madras (August, 1903), approved of in 14 Madras Law Journal, p. 181, adopts and follows the unanimous current of decisions of the Calcutta, Allahabad, and Bombay High Courts.<sup>2</sup> In the face of the later ruling of Calcutta, the earlier ruling,<sup>3</sup> which has been revised by the later decision is no longer of any authority.

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1. *Rama Samayyan vs. Vira Sami*, 21 Mad., 222, *Palani vs. Rangayya*, 22 Mad., 207.

2. *Lala Suraj vs. Golab*, 28 Cal., 517, *Devi Dai vs. Judu*, 24 All., 459, *Ramchandra vs. Fakiroppe*, 2 Bom., I. R. 450.

3. *Suraj vs. Golab*, 27 Cal., 762

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## CHAPTER VIII.

### Joint Hindu Family: Coparcenary.

It is an ordinary incidence in a coparcenary that one of the members may own the reversionary interest in the estate of a cognate relation of his own. Certain complicated questions are involved in the matter of actual devolution of the estate in reversion in such cases. But before I proceed to consider this subject, a few words, by way of explanation, are necessary. In the first place, it is not possible to conceive the case of one member of a joint Hindu family being alone entitled to the reversionary interest of a separate agnatic relation, because in that case the other members of the family must necessarily stand on equal or unequal degrees of reversionary relationships. But as the reversionary interest on the cognate line is derived through a female and by marriage, the possibility of a single member of a joint coparcenary being alone the reversioner is apparent. I would cite an apposite example of this in a recent decision<sup>1</sup> of the High Court of Allahabad. It is an instance of an ordinary case. A member of a joint Hindu family has undoubtedly all the rights of a reversioner in respect of his maternal grandfather's estate, the latter having no male issue. If the sonless widow of a male cognate makes an improper alienation without legal necessity, the reversioner in such a case has a cause of action both before and after the widow's death. The suit of a declaratory nature during the lifetime of the widow, if successfully maintained at the expense of the united family of the cognatic reversioner, is of very precarious value to the family if the member does not survive the widow to enjoy the ultimate reversion on the basis of the successful litigation. This has been sufficiently discussed and explained in an early chapter. But serious complications seem to arise, if after an improper alienation the widow dies and the cognatic reversioner of the united family

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1. *Himmat v. Bhawani*, 30 All., 352.

seeks to recover the estate from the assignee. When such a contingency happens the cognate reversioner embarks on a litigation either in his individual or in his coparcenary capacity. There is no difficulty in the former case. But when the joint expense, joint trouble, and consequently the joint risks are incurred in an endeavour to recover the estate, the reversionary property when actually recovered becomes, it is apprehended, a part of the united ownership of the family. The peculiar feature of the Allahabad case noticed above was this that the first assignment by the sonless maternal grandmother was without any legal necessity and it was in favour of the head of the reversioner's family, who in his turn assigned the same interest for consideration to a third party, apparently when the reversioner was in a state of unison in the said family. Later on it appears that the reversioner coparcener separated from the family with his share and then brought an action to recover the reversionary estate from the hands of the second assignee. In this case the question of equitable refund naturally arose. And it was contended on behalf of the claimant that he was liable, if at all, to the refund to the extent of the individual share received by him. The High Court on appeal held that as the proceeds of the sale by the managing member were brought, when the family was joint, into the common purse for the benefit of the family, and as that sale was set aside after the separation of the claimant reversioner, the latter could recover the property on payment of the whole purchase money, but that he could not claim to have it by paying only a

Equitable refund by share of the purchase money proportionate reversioner.

to his share in the joint family-property on partition. The reason for holding in this manner was, that all the members of a joint Hindu family must be regarded, so far as concerns the dealings of the family with persons outside it, as but one juristic person. This aphorism in the *placitum* of the judgment has been deduced by the learned Judges of the Court from a series of reasonings and texts of Hindu Law which govern united Hindu families. But it appears to me that the idea of the juridical entity of the family represented by the *karla* is perhaps repugnant to the right of suit of the reversioner, as in the Allahabad case, if he had been a joint member. But what difference, after all, did it make

on his right of action sometime after his separation from the community? What benefit did the plaintiff realize on being entitled to recover the estate burdened with the price thereof which ordinarily speaking represented the value of the property? It was as if he had gone to the market place rather than to a Court of law and equity to purchase property by dint of Court's order on the technical ground of reversionary interest. But is it not true that the fundamental basic thoughts and the texts of law were to some extent violated by setting up equity against equity? It appears from the pleadings in the case that the plea of estoppel was set up against the claim; but there is hardly any discussion of it in the pleadings or in the judgment. On the other hand, we find it in the decision of the Court quotations which go to lay down broader views of mutuality of disabilities in a joint family concern. Thus for instance we find it in the Smriti of Narada: "When the family is in an undivided condition, there cannot be any gift or sale between the coparceners,—such transactions being only possible between coparceners when they are divided. In an undivided state one member cannot be a witness for another, or a surety for another." <sup>1</sup> This notion of compactness and unity of ownership appears to be inconsistent with the fact that out of all the disabilities of the coparceners *inter se* a member can emerge after separation with the full rights of undoing his previous disability in the estate of jointness.

The above remarks lead up to the consideration of the reversioner-coparcener's rights when he claims partition after recovery of the reversionary estate. It appears to me that the result would be the same whether the estate quietly falls into possession of the reversioner's family, or whether it is recovered from a trespasser's hand or from an alienee without legal necessity. In this connection the cardinal doctrine of Hindu Law that property of every kind deposited in the common chest is joint and divisible, must govern the question of the coparcener's shares and interests. I do not, for obvious reasons enter into the details of the inequalities of decision under various circumstances and with respect to several kinds of

Coparcener-Reversioner on partition.

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1. K. K. Bhattacharya's T. L. L. of 1884-85, p. 199.

joint and acquired properties. It is sufficient to state that there is a very close resemblance between the reversioner-coparcener's recovery of his estate of inheritance and the recovery by any other member of ancestral or missing family properties by dint of his own exertions or at his personal expense. In the latter case it is said the texts enjoin the grant of an extra share to the acquirer. I fear, this equity also was not done to the claimant in the above-quoted Allahabad case.

There is another important feature in the recent Allahabad decision now being discussed, which should not, I think, be passed unnoticed. It has been said that the borrowing and repayment of debt by the wife when her husband is alive are gratuitous actions on her part, and they do not, *in the absence of evidence to the contrary*, give rise to such legal necessity as to pass the property absolutely to the alienee, if for the wife's debt so incurred the alienation becomes necessary. The treatment of this question in the Allahabad case is very meagre and unsatisfactory. It is not explained in the report why Mulo Kunwar borrowed money from Jiwan Sahai during the life-time of her husband; and why it became necessary for her to assign her husband's estate to repay the debt. It may not be usual in the Hindu household that the debt is incurred by the wife for a necessary purpose of the family; but every Hindu would, barring exceptional cases, presume the concurrence of the husband for the contraction of the debt. Such a presumption naturally, if un rebutted, will justify the debt in the same manner as if it were incurred by the husband himself. No one can dispute that when a widow alienates her husband's estate to repay his debt and the alienation is necessary to such repayment, the legal necessity for the transaction is completely made out. The same reasonings should, I think, be applicable to debts incurred by the wife under ordinary circumstances. The evidence in this respect, says the Allahabad Court, is wanting to show that the debt of Mulo Kunwar was of legal necessity. But on whom is the onus? I fear this is an exceptional case with respect to the burden of proof, that it is incumbent on the plaintiff-reversioner to *plead* and to *prove* want of legal necessity in the transaction. The plaintiff in the Allahabad case made, I may say, a phenomenal claim: the conveyance

Wife's debt, Reversioner's claim: *Onus* of proof.

by the widow with the concurrence of her daughter (plaintiff's mother) to the juristic representative of his own family of birth, in other words, to himself, was to all intents and purposes and according to the existing leading authorities, absolute and unimpeachable. It is very hard to understand under what principles of law and equity his claim was entertained in Court for the sole reason that he broke off from the united family and separated with one-eighth part of the estate. For all the foregoing reasons, I submit I must most respectfully dissent from the views of the Allahabad High Court.

The High Court of Bombay remitted a case<sup>1</sup> for fresh trial and decision in order that, in a claim by one widow against her co-widow for partition of their joint estate of inheritance, due provision might be made for a charge on the whole estate for the future marriages of both the widows' daughters. The claim was a peculiar one. One of the widows, after jointly succeeding to the estate of their deceased husband, assigned her interest in the joint estate to the plaintiff. Basing his claim on the assignment, the plaintiff sued the other co-widow for the partition of the joint estate in order to enjoy it during the life-time of his assignor. The claim was dismissed in both the Courts below.

There was admittedly no question of legal necessity for the assignment, and no consent of the other co-widow. The latter opposed the claim for partition; and contended, *inter alia*, that there were the charges for the marriages of the deceased's daughters over the whole of his estate. The learned Judges of Bombay, following several previous decisions, including those of the Privy Council, held that they were bound to extend to the assignee the same rights to claim partition as the widow herself had. There are authorities to show that in a claim for partition between co-widows, the Courts have inherent discretion<sup>2</sup> to allow such partition. But this point is quite beside the matter I am now considering. The learned Judges of Bombay base their decision on a Madras ruling<sup>3</sup> in support of their view that the partitionable interest of a co-widow is assignable by her at her pleasure; and that

1. Hari Narain *vs.* Vitai, 31 Bom., 560.

2. Mayne, 7th Edition, pp. 752-753.

3. Ariyaputri *vs.* Alamelu, 11 Mad., 304 (at p. 306.)

the said assignment need not be, for any legal necessity, in order to be effective and valid, within the life-time of the assigning lady, so as not to affect the right of survivorship which is attached to the interest of the other co-widow. This decision, I am afraid, does not go the length of laying down that the assignment of a co-widow's interest can be valid against her rival for any recognized ground of legal necessity known under the Hindu Law.

There may, however, be cases of gifts which have the support of the rule of legal necessity. Mr. K. K. Bhattacharya in his T. L. L. of 1884—85, page 516, discusses at length the possibility of such gifts by a father of joint family property ; the necessity of his daughter's marriage has been instanced as a case in point. A *kulin* Brahmin in Bengal will not stoop to honour and to elevate in rank and dignity a *non-kulin* Brahmin, unless the marriage of the latter's daughter is accompanied by a suitable gift. To those, acquainted with the social rules and customs of Lower Bengal, the above will appear very clear. But the rule is not confined to that Province alone. It prevails more or less throughout the country among all classes and nationalities. In a Mitakshara family no son, therefore, can object to such gifts when the father barely respects the customs and is made to pay on such occasions as those of his daughter's marriage and so forth. In a case decided by the Allahabad High Court<sup>1</sup> the marriage had already taken place. Two years after the marriage, the father redeemed a promise which he had made as the consideration for the marriage at the time of its celebration, by giving some landed property out of the joint estate to the father of his son-in-law. At the instance of one of the sons, the High Court set aside the gift *in toto*, including even the father's share, holding that the purpose of redeeming a promise made two years before, was not a legal necessity. The Court considered, it could rather offend against the rule laid down in *Girdharilal's* case than recognise the legal necessity of the transaction by enforcing truthfulness and piety on the son, on one hand, and securing a feeling of love and amity between close relations, on the other. The legal, moral, and social consi-

Gifts, etc. by father and others with legal necessity.

1. *Ganga v. Parthi*, 2 All., 636.



derations found no place in the judgment which proceeded on the sordid wordly motive of ignoring the pre-existing necessity after the sacrament had become irrevocable. The necessity was held to have ceased, and the son was allowed to revoke a gift which his father could not. But it was a debt of honour on the father's part, as real as cash received, and to a Hindu mind, trained on the lines of *Girdharilal's* case, the repugnance of the Allahabad decision, quoted above, is too obvious to deserve further notice. The state of facts disclosed in the Allahabad ruling is not uncommon. Occasions for gifts and alienations in fulfilment of promises made at marriage, *svadh*, sacrament, worships or any other necessary religious ceremony conducive to the spiritual welfare of the donor or the family, are not rare among the Hindus. A blind following of the Allahabad case will, it is submitted, be hardly consistent with the principles of legal necessity recognized in this country. Later on we find the same Court, in another decision, laying down a different principle in the case of a gift and dedication by the father of a part of joint-family estate to make a permanent provision for a family shrine. The legal necessity of the transaction was recognized,<sup>1</sup> and the Court remitted issues to enquire and to find the value of the entire family and ancestral estate, in relation to which the gift could be reasonably supported, and also to enquire into the son's allegation that the endowment had been made not *bona fide* for the support of the idol and the benefit of the donor's soul, but from motives of spite against the son. In a Madras case, there was a marriage<sup>2</sup> gift by a Hindu widow who, as the mother of a deceased son, became a qualified owner of the estate. The unmarried sister of the deceased son, though excluded from inheritance, laid a moral obligation on the estate of her father, of which her deceased brother was the last holder, for being suitably married with all the customary rites and ceremonies. The texts from the *Mitakshara* and *Smriti Chandrika* were referred to in the judgment. The mother had made a gift of land, suitable to her means and position, to the son-in-law at the time of the marriage of her daughter which she had celebrated. After her death, the reversionary heirs of her son

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1. *Raghunath vs. Govindprasad*, 8 All. 76.

2. *Ramasami vs. Vengidusami*, 22 Mad., 113.

impugned the transaction, and sued to recover the estate on the ground that there was no legal necessity for its alienation. According to the custom that was put forward, it appeared, that the community of people to whom the parties, in suit, belonged, regarded such a kind of gift, when it was not excessive in reference to the position, rank and wealth of the family, as a meritorious act. The gift was upheld, and the reversioner's claim was dismissed. It is abundantly clear from this view of the matter that every owner of an estate, absolute or qualified, has the inherent right to perpetuate grants and gifts of property which are acts of social or spiritual merit. The father of a Hindu family or a Hindu widow, the only solace for whose living in this world is to acquire spiritual benefit, would be shocked to be told that the coined legal phraseology of English lawyers, "legal necessity," was meant to check and to nullify their customary acts of piety, social rites and ceremonies and devotion. It would also be, at the same time, extremely unfair to allow the very recent development of a legal conception to override the inviolable and ever-recognized acts of traditional propriety.

In a Madras case,<sup>1</sup> the grant was made by the father as the head of the family. The defendants (sons) disputed the alienation. But the grant was upheld, as it was held to have been intended to create a secular estate for a Brahmin, and made with religious motives for the benefit of the soul. Such grants, it has been held, differ from what is known as religious endowments; and by no means are they uncommon. The whole history of *Brahmottara* lands in Bengal affords instances of such gifts of land. Religious motive for the spiritual benefit is the legal necessity for such cases.

A very common incident among people owning coparcenary estate is the marriage of children. Regarding the marriage of daughters or the girls of the coparcenary members, ample authority exists to justify it as an act of supreme legal necessity. But do the sons or the boys, adult or minor, occupy the same position? On this subject it would be useful, in the first instance, to quote the leading text of Narada, reproduced in the *Mitakshara* Chap. I, Sec. I, para 29.

Copercenary, marriage of a son. Legal Necessity, alienation.

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1. *Anantha Tirtha vs. Nagamuthu*, 4 Mad., 200.

"Even one person, who is capable, may conclude a gift, hypothecation or sale, of immoveable property, if a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties,—such as the obsequies of the father, or the like,—make it unavoidable."

Other text-writers and commentators give various versions of the real meaning of the aforesaid text. The general expressions, in which it is clothed, afford an ample field for differences of views; specially under the *omnibus* passage "or the like." The ancient and the later ordinances of the text writers, sages and the commentators are, I may be permitted to observe, the expositions of their views on the then current social, moral, and religious stand-points. Discussing the subject of marriage as an act of legal necessity or family obligation, it is impossible to be guided solely by the light of its religious aspect alone. Even as regards the question of the necessity to marry a daughter, on which there exists unanimity of views that the duty is unavoidable, the social and the moral changes which the modern times are gradually, slowly, and imperceptibly introducing in the Indian societies, will, I fear, demand consideration. Mr. Mayne, in his book on Hindu Law, Seventh Edition, page 109, has given briefly an account, not intended to be exhaustive, of the social customs of infant and adult marriages that prevail in the several provinces of India. It may very fairly be presumed, accepting the version of this learned and distinguished author of the standard book on the subject as accurate, that where very early and juvenile marriages are socially and morally regarded as compulsory, if an octogenarian manager or *kurta* of a coparcenary family contracts a marriage with a girl of tender age to leave the legacy of the latter's inevitable widowhood with all the incidental troubles and anxieties on the surviving coparceners; and if for such marriage, he incurs a debt with a charge on the family estate, and dies, I would be surprised, to say the least of it, if the survivors would allow the charge to be sued for and enforced on the estate without a challenge founded on want of legal necessity. If, on the other hand, among people who customarily hate child-marriage system, two new-born babies are allied with a matrimonial tie, resulting in child widowhood or child widower-

hood, and the marriage was the outcome of an alienation of the family estate effected by an imprudent manager, I would assail the transaction as reckless waste of property. I made the above remarks with the greatest possible reserve and diffidence; because there is a complete paucity of case-law on the subject. I am emboldened, however, by the conflicting views of eminent Judges of the High Courts of Bombay and of Madras<sup>1</sup> on the analogous subject of the boys' marriages in joint Hindu families which were celebrated with debts charged on the family estates. These are two recent rulings of the High Courts: the Bombay High Court has expressly dissented from the view of Madras by laying down that the marriage of a minor coparcener is a necessary religious *sanskar* and therefore obligatory on the joint estate of the family, and that on the death of the minor, so marrying, the mortgage effected for the marriage expenses is binding on the family, at least to the extent of the deceased minor's interest in the property. It is perfectly needless on my part to make any comments on the difference of opinions on the subject between such high authorities. I will barely content myself by indicating the difference, and by suggesting that wherein doctors differ, we are at liberty to accept the view which appears to us to be more reasonable and correct. Babu G. C. Sastri in his Hindu Law, Third Edition (1907), page 82,

Marriage as a necessity. remarks,—“The institution of marriage which is the foundation of the peace and good order of society, is considered as sacred even by those that view it as a civil contract. According to the Hindu Sastras it is more a religious than a secular institution. It is the last of the ten sacraments or purifying ceremonies. The Sastras enjoin men to marry for the purpose of procreating a son necessary for the salvation of his soul.” The learned author then goes on quoting texts to point out that though according to the sages marriage by mutual consent of the marital parties is enjoined, yet from time immemorial a custom has grown throughout the country recognizing the validity and the necessity of marriage which is brought about by the parents and the guardians of the boy and of the girl. I need not, here, dwell on the old and much vexed controversies,

<sup>1</sup> Sundarbai *vs.* Shivanarayana, 32 Bom., 81; Govindrazulu *vs.* Devarabhatta, 27 Mad., 206.

for and against early marriage that more or less prevail in India. But I will content myself by observing that as a matter of moral and religious obligation the legal necessity for the marriage cannot be impugned on the sole ground that the contracting parties had not, by reason of their non-age, the capacity to celebrate a valid marriage.

Among the divergent customs that have  
 Marriage Expenses.

grown in this country in departure from the principles of strict Hindu Law, the practice that now prevails of incurring heavy expenses for marriage in certain castes and tribes deserves very serious consideration of our Indian Courts. We find that customs of various sorts are growing and dying as time goes on. The old *Koolinism* of Bengal Brahmins is fast decaying, or rather it has almost completely died out. This is the outcome of the training of minds in the lines of the West. But though we hear the uproars of condemnation and hatred against excessive expenditures or rather the excessive demands of the bridegroom parties for the marriage of girls, we see no serious efforts are anywhere made against the practice. It appears to me that unless such controversies, being brought before the Courts of justice and equity, are judicially tested and decided, the evil of the pernicious social custom will continue its havoc on the Hindu families. Instances are not rare in which the joint or ancestral family properties become terribly encumbered or sometimes lost for ever to celebrate the marriages of a few daughters in the family. The Sastras enjoin the necessity for the marriage of a girl before her puberty ; but they nowhere sanction the imperilling or the impoverishment of the coparcenary. We find it repeatedly laid down in the cases of partition among the coparceners that provisions are made in the allotment of shares for marriage expenses by parties on whom they are obligatory. Conversely, in partition cases the excessive and improper marriage expenses incurred by the *Kurta* or the manager of the family might be a point of contention among the members. I have not seen a case of this sort tried in our Indian Courts.

There is a distinction between the moral obligation to discharge the father's debts and the secular obligations that arise out of legal necessity and benefit to the family. It is impossible to push

the logical sequences of *Girdharilal's* case to the extent of laying down that the son's obligation to discharge his father's debts, on the sole ground of his piety, is co-extensive

Liability of the son  
dependant on the assets.

with the legal obligations that arise from the debts having been contracted by the father or any other managing coparcener for legal necessity which has conduced to the joint or personal benefit. It is a settled view, whatever may be the extreme view of the High Court of Bombay as pointed out in *Mayne*, para 280 (4th Edition), that the son's liability, based purely on considerations of piety, is limited to the assets. Even in Bombay, however, the prevailing view may be illustrated by citing an instance.<sup>1</sup> It is there laid down that the decree against the son must be passed, although the deceased debtor (father) may have left no assets. Looking into the case more closely, we find *Jardine, J.* remarking that "if they (sons) had no property, the only result would have been that the decree could not have been executed against them." Possession of assets, then, is the condition precedent in such cases. Between Bombay and elsewhere, the matter of difference is one of procedure only; that is, other Courts would refuse to pass a futile decree against the son, if he is not possessed of any assets left by his deceased father (debtor), whereas in Bombay that enquiry is left for the Court executing the decree to determine. In principle, there is absolutely no difference. Whether the father be living or dead at the time of action, the only ground under which a decree against the son can be claimed, provided the debt is pure, is his being possessed of assets. The Bombay ruling cited above does not appear to have been reviewed by any subsequent ruling of Bombay or elsewhere. Mr. *Mayne* at page 391 of his book on *Hindu Law*, 7th Edition, has considered a series of rulings of the Bombay High Court on the subject. They amount to this that the decree against the son for the debt contracted by his father must, as a matter of procedure, be passed as against the deceased's legal representative. I wish only to add that the so-called assets referred to in the ruling quoted, need not necessarily be the estate inherited from the father. Joint or ancestral property acquired by right of survivorship is within the

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1. *Lalla Bhagvan vs. Tribhuban*, 13 Bom., 653.

purview of the word 'assets.' This is in accordance with the general Hindu Law prevailing in the country, apart from the special legislation on the subject in Bombay, discussed by Mr. Mayne at footnote. The ruling quoted above is misleading, in so far as it seems to indicate that the liability of the son is contingent upon his inheriting the estate of his deceased father.

If, again, the father as the manager had incurred the debt for a legal necessity, beneficial to the estate or to the members, the debt would carry a higher obligation than what is imposed by the sole consideration of the son's piety. This is quite obvious. In

Otherwise in cases of legal necessity

addition to the sacredness of the debt, there would be the further ground of personal obligation introduced by the doctrine of legal necessity. Under such circumstances, possession of assets would seem to be not the necessary condition precedent. Besides the father, any other managing coparcener can similarly bind the family by a debt of legal necessity. A good case of legal necessity being made out in a properly framed action with proper pleadings and the form of suit, the debt may be saddled on parties other than he who had incurred it, in the same way as if they themselves had borrowed the money. The transactions effected or entered into under its pressure are valid, independent of any other consideration.

In a coparcenary, the father or any other managing member with whom legal necessity of the family is a matter of concern, is sometimes called the *kurta*.

Texts re Manager's powers

The text of Vrihaspathi cited in the Ratnakara (*vide* Mitak. Chap. I Sec. 1. para 28) bearing on the question is as follows :—

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes." Jimutavahana in his Dayabhaga, Chap. II para 26 lays down :—

"If, however, the family cannot be maintained without selling the whole immoveable property, then it tacitly follows that the sale of the whole immoveable property would be valid. Since the Veda prescribes that one must at all events preserve himself."

The above passages are the only leading and relevant texts on the subject.

There are two aspects in which the transactions by a single member in a joint family may be considered. The member may occupy the position of being the manager of the family or not. The two important divisions of law in this connection are, (1) alienations effected for personal need or necessity, and (2) disposal of the entire estate or a definite part thereof for the common benefit of the family. Bearing in mind the fundamental doctrines of the Mitakshara and of the Dayabhaga relating to the question of individual rights in property, it seems clear in the first instance, that there can be no kind of objection as to why a single member should not be able to deal with his own interest in the property for his own personal necessity. It is also equally clear that if the said member is the accredited manager of the family, he can deal with the whole estate for valid legal necessity of the family. Concrete instances will be quoted to present a variety of aspects and the decisions of the Courts thereon. Regarding the former, there is no unanimity of views of the Courts in this country.

Take a joint family consisting of A, B and C as coparceners. C finds a personal or an individual want for which he alienates his own interest in the joint estate. It may be said at once, that in this respect, the Courts in the Presidencies of Bombay and Madras, and in their train, those of the Central Provinces and Berar, have ranged against the prevailing view of the Mitakshara recognized and accepted by the Courts of Bengal and of the United Provinces. The current of authorities, from the very earliest time, in the several provinces, has been so uniform that the Privy Council has, by repeated rulings, followed the salutary doctrine of *Stare decisis*, and upheld the divergent and discrepant views as being the rule of law prevailing in those Provinces. It is necessary, for the better understanding of the subject, to present the brief outlines of the prevailing view of each province separately. But before we do so, it is necessary to point out that the chief feature of the difference of opinion consists in this, that

Conflict among the Mitakshara Schools of Provinces re personal necessity



Alienation of his interest for value by a single member valid.

in Bombay, Madras and Central Provinces the settled view of Courts is to recognize the validity of an alienation made by a single member of his own interest for his personal need; and that the Courts of Bengal governed by the Mitakshara and those under the sway of the Allahabad High Court maintain the contrary view.

Also under execution of decree.

But even in the Presidency of Bengal it has been ruled<sup>1</sup> that the right, title, and interest of one co-sharer in a joint ancestral estate, if attached and sold in execution of decree, are validly transferred. There is a practical unanimity among all the High Courts on this particular point. It has been held that the purchaser at such a sale acquires merely the right to enable a partition against the other co-sharers to the same extent, and (it may be added) subject to the same equities which the judgment-debtor possessed. The case just cited came from the Bengal Presidency. Their Lordships of the Privy Council, being conscious of the discrepant views prevailing in this country, left the question of voluntary alienation by a parcener of his rights or share in the estate, an open one, to be regulated by the peculiar doctrines in force in different places. The celebrated Full

Otherwise in Bengal and U. P.

Bench decision<sup>2</sup> of Calcutta, under the Mitakshara law, has distinctly declined to recognize the right of such an alienation. It has been held in that case that under the law of the Mitakshara as administered in the Presidency of Fort William, a single coparcener has no right, without the consent of his cosharers, to mortgage his undivided interest in a portion of the joint family property in order to raise money on his own account, and not for the benefit of the family. The case went up to the Privy Council, but on this particular point, their Lordships pronounced no definite opinion. The distinction between private and public alienation in Bengal, as suggested by the aforesaid rulings, has been maintained by later decisions of the Calcutta High Court.<sup>3</sup> The last mentioned case is one of competition between a mortgage by

1. *Deendyal v. Jugdeep Narain*, 3 Cal., 198, P. C.

2. *Sadabart Pershad v. Foolbush Koer*, 12 W. R., 1 F. B.; 3 B. L. R., 31 F. B.

3. *Rai Narain v. Nownit Lal*, 4 Cal., 809; *Jallidar v. Ramlal*, 4 Cal., 723; *Jamna prasad v. Ganga*, 19 Cal., 401.

all the co-sharers and a sale by only two out of them. The former was held to prevail as against the latter which was neither for the common benefit of the family nor was the transaction effected with the consent of all the co-sharers. The course of decisions in the Presidency of Madras is to show that if the transfer of the interest of one sharer is effected by him for valid consideration, or if such transfer is brought about by execution of decree, the effect is the same; namely, that the transferee acquires the interest conveyed.<sup>1</sup> The Madras High Court pushed their conclusions farther and held that a purchaser for value can enforce his remedies for the share purchased after the death of the vendor. It has also been held that in such a case, if the purchaser does not immediately recover his interest, the same continues subject to the usual incidence of *pro tanto* increase or diminution of interest in a Mitakshara family brought about by subsequent births and deaths—the specification or description of the share at the time of the purchase being no guide.<sup>2</sup>

The settled view and interpretation of the Mitakshara of Bengal and of the United Provinces are amply borne out by two important decisions of the Privy Council. They are cases of alienations by a coparcener of his interests for his personal benefit and no family legal necessity. In each case the claim of the survivors prevailed and the right to sell an undivided interest was denied.<sup>3</sup> These decisions were arrived at after considering most of the leading decisions of the Provinces which their Lordships of the Privy Council did not think proper to disturb. The Central Provinces of India, following in the wake of the prevailing rulings of Bombay and of Madras, have a series of decisions on the same line.<sup>4</sup>

In the midst of the discrepancies among the several High Courts on the point indicated above, there is a unanimity in respect of the result of alienations brought about by the execution of decree. There

1. Arangun v. Sebahpathi, 5 Mad., 12; Subramanian v. Subramanian, 5 Mad. 125; Dorasami v. Aliratre 7 Mad. 136.

2. Alamalu v. Rangasami, 7 Mad., 588; Rangasami v. Krishnayyan, 14 Mad., 408 F. B.; Rangayana v. Ganapa, 15 Bom., 673.

3. Madho Prasad v. Mehrban, 18 Cal., 157 P. C.; Balgovind v. Narain Lal, 15 All., 339 P. C.

4. Digest of J. C. Rulings, Part VIII, No. 90. Dewakor v. Janardhan, 3 C. P. L. R., 64; Ramprasad v. Deokaran, 6 C. P. L. R., 60; Ami Chand v. Lokenath, 4 C. P. L. R., 139.

is also another point in which the Courts are agreed ; and that is the case of gratuitous alienation by a single member of his share or of the estate. If the alienation is for no consideration,

*Alienation of joint estate or share for no consideration, gift &c.*

and therefore there is no justifying necessity, personal or joint, to support it, the Courts have always refused to give effect to it. In a Madras case,<sup>1</sup> the father made a gift of the ancestral property. A suit was brought on behalf of his minor son to annul the transaction. The father had himself sued in revocation of his gift, but failed. The suit by the son succeeded and the gift was annulled. In a Bombay case,<sup>2</sup> all the adult members combined in making a gift of certain land to a person who was the worshipper of the family deity. A minor coparcener was not a party to the gift. The donee sued the occupiers for possession. The interest of the non-consulted minor coparcener was only  $\frac{1}{4}$ th in the land gifted. Here though the majority of the donors of the estate joined in the gift, the Court recognized no legal necessity to make the alienation for the worship, and the gift in its entirety was not given effect to. The learned Judges of Bombay relied on the two well-known principles of the Mitakshara law, Chap. 1, Sec. 1, paras 28 & 29. Para 28 has been quoted already, the next para is as follows,—“ 29.—The meaning of the text is this :—While the sons and grandsons are minors and incapable of giving their consent to a gift and the like ; or while the brothers are so and continue unseparated ; even one person who is capable may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family render it necessary, or if indispensable duties such as the obsequies of the father or the like make it unavoidable.”

The *placitum* quoted above, contains in a nutshell the principles of the doctrine of legal necessity in relation to the subject now being considered. It is apparent from the plain wording of the texts just quoted that a single member or a set of members who are “capable,”—meaning who are trusted with the management,—may do such acts under the pressure of unavoidable family exigency. The author of the Mitakshara illustrates the meaning of pious gifts by referring to the “ obsequies of the father or the like,”

1. Ramanna v. Venkata, 11 Mad., 246.

2. Kalu v. Barsu, 19 Bom., 803.

and puts them in the category of indispensable family necessities. It must not, however, be supposed that the expression, "or the like," leaves wide-open the doors of charity or that the managing coparceners can be excessively charitable at the expense of others. The decisions of Courts are to indicate that there must be a deep undercurrent of recognized legal necessity to support a gift of joint estate. It would appear that a coparcener, who has the undoubted right to demand and to get his proper share cannot, in violation of the fundamental coparcenary ties, part with even his own undivided rights by an alienation for no consideration which benefits neither himself nor the coparcenary. The two conflicting Mitakshara Schools,<sup>1</sup> of Madras and of U. P., between which there is a point of solid difference in respect of the coparcener's right to transfer his share for value, are unanimous in holding that a gift by a father, in defiance of his minor son, of ancestral estate, is null and void. The Madras case was a gift to the wife and two married daughters. The alienation was set aside at the instance of the minor son suing through a next friend. In a later ruling,<sup>2</sup> the same High Court passed a decision in which the following passages occur :—

"In paragraphs 331 to 334 of Mayne's Hindu Law, the learned writer gives the history of Hindu law of the alienability of an undivided share by a coparcener as administered in this Presidency. The decisions passed subsequent to the date of the decision of the Privy Council, *Baba v. Timma*, I. L. R., 7 Mad., 357, and *Ponnu-Sami v. Thalta*, I. L. R., 9 Mad., 273, show that a coparcener is not at liberty to alienate his undivided interest by gift except when he is expressly authorized to do so by a text of Hindu law ; because the equity which exists in favour of a purchaser for value, does not arise in favour of a donee, who is a mere volunteer. In the former case, the question was fully discussed by a Full Bench of this Court, and the conclusion arrived at is that a coparcener has no power to alienate his undivided interest by gift, unless such gift is sanctioned by an express text of Hindu law. As regards devises by will, it was held that at the moment of death, the right by survivorship arises, and as it is in conflict with the right by devise,

1. *Rayakal v. Subbanna*, 16 Mad., 84; *Bisheshar v. Pirithi Pal*, 2 All., 635.

2. *Krishnasami v. Raja Gopala*, 18 Mad., 73 (p. 84).

the former prevails as the prior right against the latter. The law applicable to the alienations of an undivided share may thus be summarized. It may be alienated for value, but not otherwise, except where a gift is expressly sanctioned by Hindu law, and the equity of the creditor or the purchaser is the foundation on which the power to alienate for value rests."

The above contains the general outlines on the subject of the coparcenary rights, undivided rights therein and the powers of managers and others to transfer the whole estate or their interest for value or gratuitously. It would be doing most scanty justice to the subject, if the reader is not presented with some details of decisions bearing on the views prevailing in the different parts of the country,—and this we now proceed to do.

Distinguishing the Madras case cited above a Division Bench of Bombay<sup>1</sup> has upheld the gift of some ornaments, which are apparently the joint estate of the father and his sons, by father-in-law to his widowed daughter-in-law. The report of the case does not show the justifying reason why such a gift should have been made at all. A widow of the family living in unison and in harmony is not in need, strictly speaking, of separate estate in moveables in such a manner as to bind the other coparceners not consulted in the matter of disposal in her favour. We will therefore assume, though the facts of the case do not disclose it, that on account of some friction or otherwise it became incumbent and indispensable duty on the part of the father to allot family-ornaments to the widow of his predeceased son. Without this important line of distinction the so-called distinguishing rulings read like discrepant views on the same subject. Under the circumstances presumed above ornaments worth about Rs. 2,000 were allowed to be given, out of the joint estate worth about Rs. 23,000. The learned Judges followed the analogy of an Allahabad ruling<sup>2</sup> in which the gift or rather the appropriation in favour of a family-idol, of property worth Rs. 600, out of an estate worth Rs. 2,000, was upheld. The texts in favour of gifts of affection and of piety were relied on,

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1. Hanmantapa v. Jivu Bai 24 Bom., 547.

2. Raghunath v. Gobind 8 All., 76.

It was pointed out that the father or the *harta* of the joint family has greater latitude and enjoys the privileges to make small and reasonable donations out of the joint moveable estate under his control and management than he has over the immoveable property of the family.

It is indeed remarkable that the same texts of the Mitakshara having received different interpretations in the four leading Provinces of India, a body of case law has grown up in relation to the coparcener's rights for the disposal of his interest in the joint estate. We did not think it necessary to trace the gradual development of ideas by noting the early rulings. We have given the later rulings, the Full Bench decisions and then the Privy Council decisions, clearly establishing that the conflicting views on the subjects have attained such a shape and solidarity in the various Provinces that it is impossible to reconcile them and to reduce them to consistency. The result, therefore, is that in the United Provinces of Oudh and Agra and in Bengal where the doctrines of the Mitakshara prevail, no coparcener, unless he is the manager and acting for the common benefit and under legal necessity for the whole family, can touch the joint estate for his own needs and purposes. He cannot alienate his undefined and undivided interests, and his doing so will not benefit the transferee either during the transferer's life-time or after his death, and the other members can at once set his dealings aside. He may indeed borrow money, and if during his life-time, the creditor seizes his undivided interest, that interest is available and severable from the whole estate under the principle of *Deendyal's* case which is of universal application. In the Deccan, on the other hand, the powers of the manager to deal with the joint estate are of course the same. But any other coparcener has the undeniable right to transfer his interest for value, and the alienation can be enforced during his life-time as well as after his death.

In Bombay,<sup>1</sup> a joint brother sold half the estate which represented his share for his personal necessity. The transferer and his brother died, the latter leaving a widow in sole possession. The transferee sued and recovered the half share from the surviving

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1. *Manjappa v. Lakshmi* 15 Bom., 234.

widow. In a similar case,<sup>1</sup> the High Court of Madras ruled to the same effect. The coparcener sold his half share to the plaintiff and the other coparcener made a gift of his share to his daughter-in-law and died. The Court decided that the gift was void, and the sale, though it appeared to have been not justified by any circumstances of family necessity, was yet valid to the extent of the moiety conveyed.

The rules that prevail in Bombay, Madras and the Central Provinces in relation to the coparcener's right to alienate his interest in the joint concern resemble the state of things in Bengal proper. The analogy is close enough. We have already

Bengal view resembles Bombay, Madras, and C. P.

noticed the view of coparcener's ownership in joint-property under the Dayabhaga system as distinguished from that under the Mitakshara. The former is always sharply defined and at any time ascertainable, while the latter is an inchoate right which is undefinable before partition. The analogy referred to above consists in this, that if a joint estate in Bengal is owned by several coparceners, each parcener can alienate his interest to whomsoever he pleases. If he happens to be the head of the family, or the *karta*, he can act in view of the demands of the family necessity as well as of his own in the disposal of the joint estate or his own share, as the case may be. Says Jimutavahana (Dayabhaga, Chap. 2, para 31).—"When there are many sprung from one man, having duties apart, transactions apart, and separate in business and character; if they be not accordant in their affairs, should they give or sell their own share they may do all that is just as they please, for they are the lords of their own property." The renowned head and the leader of the Bengal school of Hindu Law,—Jimuta,—has, by a process of very subtle arguments, succeeded to arrive at conclusions which cannot fail to elicit the admiration of the student of Hindu law. He first of all scouted the early doctrine that the interest of the son in ancestral property is from his birth. He held the father to be the *de facto* and the *de jure* owner of the whole ancestral and joint-estate, and that in his absence, if the estate is held in coparcenary, brothers, cousins, uncles

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1. Virayya v. Hanunatha 14 Mad., 459.

nephews, and so forth are all undivided owners of their respective interests which is alienable and heritable by their respective heirs including even the females. A judgment<sup>1</sup> of the Privy Council refers to a case of will in the District of Midnapur in Bengal. The testator bequeathed a four anna share of a Zemindary to his youngest widow and her son for their maintenance with power to them to alienate, by sale or gift, the property bequeathed. Their Lordships, applying the well-known rule of construction to the bequest by the test of *intention*, held that each of the two legatees took an absolute interest in a two anna share in the estate. Consequently the decision affirmed and ratified the conveyance by the widow of her two anna share, holding that such conveyance operated as a severance of the joint tenancy between her son and herself and that it was valid and effectual without her son's consent. The Privy Council overruled a contrary ruling<sup>2</sup> of the Madras High Court. *Vide* I. L. R., 21 Mad., 425 (p. 427).

Regarding the manager of the joint family estate we have, in the first instance, to recognize the distinction between the father acting as the manager and any other coparcener acting in the same capacity. To the rights and the privileges with which the manager is invested by a sort of tacit consent and mutual understanding, the father adds the weight of his relationship with the attendant pious obligation on the son which the Hindu law prescribes. A sharp line of distinction is sometimes drawn by Courts<sup>3</sup> between the doings of a manager-father and a manager-coparcener (a brother or the like). In the case just cited, Mitter and Field, JJ. have laid it down as a broad proposition of law, that if a managing member of a joint Hindu family (in this case, he was a brother) governed by the Mitakshara law mortgaged the joint family property for the purposes of the family and for legal necessity, and the mortgagee sued the mortgagor alone and the sale of the whole property was ordered, the non-impleaded brother's share in the said property could not pass. The proposition stated in this way is too

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1. *Jogessur v. Ram Chandra*, 23 Cal., 670.

2. *Vydinada v. Nagammal*, 11 Mad., 258.

3. *Abilak Roy v. Rubbi Roy*, 11 Cal., 293.



broad for implicit acceptance, specially in view of later rulings of the other High Courts and of the Privy Council to be noticed hereafter. In the Calcutta case just cited, it appears to have been accepted that the mortgagor was the manager, that the debt and the mortgage were the outcome of legal necessity, that the mortgage was of an entire part of the joint estate, and that the decree and the sale related to the whole estate mortgaged. Yet the principle of the matter was subordinated to the petty details of adjective law, and the sale was nullified *pro tanto* to the extent of the interest of the unimpleaded coparcener who was obviously benefitted by the loan contracted by the manager.

The authorities on this subject show clearly that a hard and fast rule cannot be laid down ; but that in each case, the determination as to whether the other parceners are or are not concluded by their consent, expressed or implied, must depend upon its own circumstances. Leaving the question of the legal obligation to discharge the father's debts aside for the present, the ordinary powers of the father or of any other managing member in a joint Hindu family are identical under the Hindu law. There is no special privilege attributable to any particular relationship. The real test is whether a

Manager's powers to bind estate. Who is Manager? particular transaction in question has the support of legal necessity. Whether expressly or impliedly, the acting member is the manager and has the consent of his fellows. If these points are answered affirmatively, his act, through the medium of the law Court or beyond its precincts, would bind all. The manager, whatever may be his relationship to the other members of the family, is the accepted and the accredited agent for all. He may be the eldest or the youngest brother, the son or the great-grandfather, the uncle or the nephew. In a Bombay case<sup>1</sup> the alienation was by a step brother, recognized as the *de facto* manager. The family was undivided. One brother left the estate under the management of the other. The latter for an urgent family necessity—marriage of the former's daughter—alienated a part of the estate and died. The former returned and questioned the alienation. Sargeant, C. J., after referring to some earlier rulings of the Calcutta High Court, and the observations of Mr. Justice Mitter, delivered the decision of the Court by ruling,

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1. Chhoteram v. Narayandas, 11 Bom., 605.

that the absent brother must, under the circumstances, be presumed to have intended that the alienation was necessary. The claim was, therefore, not allowed.

The Calcutta case of *Abilak Roy* (I. L. R., 11 Cal., 293) mainly relied on the Full Bench of the Madras High Court.<sup>1</sup> There, the elder brother, acting as the manager, executed a mortgage-deed. Decree was obtained against the executant of the bond. The other brothers were not impleaded. It was held that their interest was not affected by the decree and the execution sale, *although the mortgage itself might be binding upon them*. It is worthy of note that both these rulings recognized the binding nature of the debt, yet the obligation was avoided on the sole and technical ground of the original defective procedure and frame of suit. There is indeed much to be said in favour of the proper framing of the suit, marshalling of the parties, and exhibiting the representative character of the lender. A series of

Frame of suit against manager for his acts on the estate.

rulings,<sup>2</sup> chiefly of the Allahabad High Court, may be quoted in support of that argument.

But it is impossible, as it is unreasonable, to subordinate the principles of law, equity, and of common justice to the technicalities of an adjective law. The Court

Really representative action not reopened, though major coparcener treated as minor.

should look not so much to the manner as to the matter of the litigation; and if need be, it is the duty of the Court of law and of equity to draw

up the veil and look behind the curtain to discover the real nature, object, and scope, of the action. If the debt is contracted by the manager for legal necessity, and the decree directs the sale of the property charged for the debt, the whole estate passes at the execution sale.<sup>3</sup>

Most of the authorities on this subject have been considered by the Privy Council in a decision<sup>4</sup> arising out of an appeal from the Chief Court of the Punjab. Most of the leading Indian cases were cited before their Lordships. The chief question for decision was

1. *Subramani v. Subramania*, 5 Mad., 125 F. B.

2. *Dosa Singh v. Ram Manohar*, 2 All., 749; *Chand v. Gangaram*, 2 All., 900; *Ram v. Bhowan*, 3 All., 443.

3. *Trimbuck v. Narayan*, 8 Bom., 481.

4. *Davial Rum v. Mehr Chand*, 15 Cal., 70 (P. C.)

whether the interests of the non-managing members, not impleaded in the action, passed under an execution sale brought about by a mortgage effected by the managing member for valid legal necessity. Their Lordships observed :—" It appears from the cases that have been decided that, notwithstanding the defendants (the members who were not parties to the suit) were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title, and interest, of the two parties who were made defendants." Their Lordships referred, with approval, to the judgment of Pontifex, J. in *Parsid v. Hanooman*, I. L. R., 5 Cal., 852, wherein that learned Judge is reported to have said thus :—" It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority, (the touchstone of which is necessity) mortgages the whole sixteen annas of the ancestral property, then, in a suit by the mortgagee, the sale under the decree would pass the whole sixteen annas of the mortgaged property, although the mortgagor alone was made defendant ; and the reason for such decision probably is that the sixteen annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right validly acquired, to have the whole sixteen annas sold." The real test in such cases is, what has been very clearly and forcibly expressed in another decision<sup>1</sup> of the Privy Council. Their Lordships have said :—" If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit or the creditor might legally procure a sale of it by suit. *All the sons can claim is that, not being parties to the suit or execution proceedings, they ought not to be barred from trying the fact on the nature of the debt in a suit of their own.* Assuming that they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to justify the sale."

The above is the simple and the only test we have to apply. That test governs not only the sons, but any other coparcener questioning the doings of the manager of the family is subject to the same principle.

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1. *Nanomi and Madan Mohan*, 13 Cal., 21 (P. C.)

If by an act, such as sale, mortgage, or the like, the whole or a definite part of the whole estate is made to pass or is subjected to the charge of mortgage or any other mode of alienation, the question is whether the act is really by the manager for legal necessity. If in the proceedings before the Court or between the parties out of Court, a coparcener is not concerned nor consulted, he can always challenge the transaction and bring both the *status* of the manager as well as the question of legal necessity under trial, and subject the issue for the adjudication of the Court. The ultimate result of the transaction will depend on the affirmative or the negative finding on the issue.

On the foregoing principles, Mr. R. J. Crosthwaite, the Judicial Commissioner, C. P., has decided a case<sup>1</sup> in the Central Provinces. The learned Judicial Commissioner has followed the decisions of the Privy Council and the later rulings of High Courts just referred to and dissented from the views expressed to the contrary in other rulings already referred to. It has been ruled that if a mortgage is effected by the managing members of a joint Hindu family, a decree for foreclosure or sale is obtained against those members alone, and the property is absolutely foreclosed or sold, the transfer thus effected would bind the interests of the other members though not parties to the transaction or the suit.

Some Courts place very little weight on matters of form and procedure, substantial justice founded on the clear and the intrinsic merits being considered more important. In a Bombay case<sup>2</sup> the suit was filed after the death of the manager against his three surviving brothers for a debt which the deceased manager had contracted for legal necessity and benefit of the family. Decree was passed in an exceedingly awkward form. It directed realization of the debt from the property left by the deceased manager. The property of the survivors was attached and sold, and it was purchased by a third party. The Court, following the principle laid down in an earlier decision<sup>3</sup> of the same High Court, and having found (1) that the deceased was the manager, and (2) that the debt was a legal necessity, took a more rational view of the matter than what the inartistic and the improper

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1. Gopal Rao v. Gangay, 2 C. P. L. R., 221.

2. Jankibai v. Mahadeo, 18 Bom. 147.

3. Hari Vittel v. Jairam 14 Bom., 597.

framing of the decree suggested, and decided on the consideration of what was actually bargained for and sold. It was considered ridiculous to apply to the case the fiction of the Mitakshara law, that the deceased's interest in the joint-estate died with him, and that the purchaser consequently acquired a mere song and a bag of wind. The Court held that the right, title and interest, of the family of which the deceased had been the manager and for the benefit of which the debt had been incurred, were intended to be sold and were purchased.

The above decision presents, however, an instance of a very bold departure from the ordinary run of rulings which prefer to follow the wording of the decree. The deduction and the result arrived at in the case may be quite compatible with reason and substantial justice. But it must be admitted that there has been less regard for the proper framing of the suit and of the decree in such cases than what has been laid down in recent cases. To avoid possible risks and difficulties in cases of improperly-framed decrees it is necessary that by appeal, review, or amendment the decree should be rectified in conformity with the requirements of the case.

There can be no doubt that very serious conflicts of views exist in the case-law on the subject of sales and alienations effected by the manager in his own name of the joint family estate. The conflicts further exist in the rulings of Courts in respect of the results of execution sales brought about in suits against managers or *kartas* of joint families albeit the debts which are the foundations of decrees and execution sales are grounded on legal necessity. In some cases the decrees may have been founded on mortgages executed by the managers. In others they may have been decrees for money only.

Mr. Mayne in the Seventh Edition of his book on Hindu Law and Usage, pages 464 and 465, has noticed and classified the conflicting views on the subject that prevail in India. Beyond differentiating the matter, in a parenthetical passage from the obligations imposed on the piety of sons to discharge their father's debts the learned author has tried to justify the views of some of the early cases on the ground that the creditor, the decree-holder, or the auction purchaser must thank himself for the deplorable result of the *pro tanto* release of the non-impleaded coparce-

Remarks on conflict of views re alienations by auction sales against managers of joint families.

ners' interests for the reason that the original action was not properly framed with the full array of parties. On the other hand, under the second classification of cases in which there was the similar defect of procedure in the framing of suits, the learned author has not a word to say why the sauce for the goose is not the sauce for the gander. The fact of the matter is that the later decisions of Courts founded on the correct view of the point as explained by their Lordships of the Privy Council,<sup>1</sup> have laid down that if in a subsequent litigation, instituted by or against the non-impleaded coparceners, it be established on evidence that the debt, mortgage, or decree was founded on legal necessity and the same was incurred by the accredited head of the family, there is no reason nor justification to uphold the interests of the non-impleaded parties simply on the technical ground that the original suit had been against the manager alone. I am unable to understand and to follow some of these early rulings noted under (1) in Mayne's 7th Edition, page 464, wherein the auction sales held in mortgage decrees against the managers and purporting to convey the entire interests in the properties to the purchasers, were set aside at the instance of the other coparceners in defiance of the findings, not in the original case, but in new suits instituted by or against them that the debts were of valid legal necessity and binding on the family.<sup>2</sup> I would draw the readers' attention to the passage, italicised above in the decision of the Privy Council, that relates to the son's right to sue and to establish the illegal or immoral nature of the debt or obligation incurred by the father. No unimpleaded coparcener is debarred from putting the execution sale effected against the manager to the same test. On this subject the remarks of Babu Golap Chandra Sastri (Hindu Law, Third Edition) are the following: "It has been held that a decree in a suit against one brother alone, based on a mortgage executed by him as manager for legal necessity even during the minority of another brother, and the sale of the mortgaged property in execution of that decree, are not binding on the other brother: I. L. R., 11 C., 293; I. L. R., 5 M., 125.

"The learned Judges in these cases enunciate the ordinary principle that a person ought not to be deprived of his right by judicial proceedings to which he was no party. But if the debt was one payable by

1. *Doulat Ram vs. Mehr Chand*, 15 Cal., 70 P. C.

2. See *Sakharam v. Devji*, 23 Bom., 372, and remarks on Mayne on the point.

that person as well as by the parties to the previous suit, and the property was sold at its proper price, and there is no other ground for impugning the decree or the sale, so far as his share is concerned save and except the mere technical objection of his not having been made a party to the previous proceedings, then it has been held in some cases, having regard to the peculiar nature of the transaction and position of the members who alone had been made defendants in the previous suit, that all the members were bound by the proceedings although some were not joined on the record."

The interest of a coparcener under the Dayabhaga School of Hindu Law, and in accordance with the decided cases in the Bombay and Madras Presidencies and the Central Provinces the interest of a coparcener in a joint Mitakshara family, is transferable by sale or by mortgage without the consent or the concurrence of the other coparceners in the family. It has also been seen that the undivided interest of a coparcener in the Mitakshara families of Upper India including Bengal, is not capable of such transfer by private alienation. If an executory contract for the sale, mortgage or transfer of any other kind is entered into by a co-sharer in any of the aforesaid Provinces, it is needless to say that the prevailing rule of law should govern the decision of the case. Two cases of this sort have come to my notice.<sup>1</sup> The one, decided by the Judicial Commissioner at Nagpur, is based on the view of law prevailing in the Deccan, that a co-sharer is competent to transfer his interest in a joint property for value. But having regard for the equities of such cases in which a stranger or an outsider of the joint family is introduced into the coparcenary, decree for possession was not passed in favour of the specific vendee. Because, that relief was left for adjustment for partition proceedings that might be instituted by the specific vendee on foot of his ownership over his share in the joint property. In the other case of the Madras High Court, the coparcener agreed to sell an entire piece of the joint family property in consideration for a price alleged to have been for a family purpose. The payment of a family-debt was set up as the legal necessity for the transaction. But this matter was apparently dropped out of the case which

Specific performance of contract, Coparcener's interest, Legal necessity.

.1. *Kosuri v. Ivalury*, 26 Mad., 74. *Thakur v. Hardayal*, 3 N. L. R., 160.

proceeded up to the High Court on the sole ground whether it was competent for the managing coparcener to bind the other co-sharers by his agreement to convey land belonging not solely to the specific vendor. This was decided in the negative, and it was held that the plaintiff had, to start with, no cause of action against the other coparceners. Curiously enough the final decree of the Court formulated by the learned Judges of the High Court of Madras was to the effect that the plaintiff was entitled to the sale of the whole property including the interest of the other non-contracting coparceners, leaving open the question as to whether the latter interest was conveyed to the plaintiff or not. This is a very strange judgment having regard to sections 14 and 15 of Act I of 1877. Consistently with section 15, it should have been held that the remedy of the plaintiff, if he insisted on the specific performance of the contract, was confined to his getting the share of his specific vendor for the whole price agreed upon and without any claim for compensation in respect of the larger portion of the property belonging to the other coparceners. A final decision of the sort is enjoined by the law on the subject. In lieu thereof we find the decision of the High Court entailed on the decree-holder anxieties and troubles for settlement by a future litigation. Needless to say that the claim of the plaintiff would have been dismissed *in toto* in the Provinces of Upper India governed by the Mitakshara School of Hindu law.<sup>1</sup>

Reverting to the subject of the liability of the other members in a joint Hindu family for the debt incurred by the manager thereof,—such debt being one of legal necessity,—we find series of rulings of the High Court of Madras which are worthy of notice. The *karta* or the manager of the family incurring a debt of legal necessity may alienate the joint estate therefor.

He may simply borrow without creating any charge on the estate whatever. Litigation to enforce the claim may be commenced during his life-time or after his death. These are the only

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1. In the Deccan a coparcener can always validly sell his own interest only in joint property. An executory contract by him cannot confer on the specific vendee higher rights than what could be done by an executed contract of sale, etc. A release by a father of his own interest for an exiguous sum of Rs. 5,000 in ancestral estate worth some lacs did not affect the vested interest of his own son.—*Shivaji vs. Vasant Rao*, 33 Bom., 267.



possible contingencies under which the varieties of disputes discussed in this chapter may arise. In a Madras case,<sup>1</sup> the judgment-debtor died after the decree which was for money only without any charge on the estate. The judgment-debtor's sons and other survivors in the coparcenary objected to the attachment of the estate levied after the debtor's death and succeeded. The decree-holder brought a new suit and obtained a decree for the payment of the claim out of the family property.<sup>2</sup> It was pointed out in the ruling that in the case of the sons surviving, the decree-holder need only prove the loan which the sons cannot avoid repaying without proving that the debt belonged to the exceptional class. In the case of any other coparcener, the claimant for a new decree must establish that the deceased debtor was the manager, and that the debt originated from legal necessity.

An important point of limitation was decided by the Madras Court in the above ruling. It may be noted, at the outset, that in case of mortgage or charge created by the manager for a legal debt, there is absolutely no difficulty on the score of limitation. The difficulty arises when a fresh decree is sought on the footing of a judgment-debt after the death of the manager-debtor, when, perhaps, the right of suit founded on the original cause of action will have been long barred by limitation. If, then, a fresh suit lies, because the debt is otherwise legally recoverable from the survivors, what article of the Limitation Schedule will govern the action? It is clear that the principle of legal obligation, piety of the son, and legal necessity are the foundations for the new claim. The death of the managing debtor gives right to a new cause of action, as it were, for a new suit. Of course, if no suit had been filed during the life-time of the manager, and the original cause of action upon the loan had not been exhausted by a suit, ordinary limitation would apply within the prescribed period of which, the suit must be brought. If, however, as in the case under consideration, the original debtor had been sued and a decree obtained, and if that decree became

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1. *Ramayya v. Venkata*, 17 Mad., 122.

2. *Dharam Singh v. Angan Lal*, 21 All., 301.

quite unavailing in consequence of the death of the judgment-debtor and the lapsing of his estate by the rule of survivorship, and a new suit for a fresh decree became necessary, as has been held by another ruling<sup>1</sup> of the Madras Court of a later date, what would be the period of limitation for such a suit ?

At first sight, it would appear, as if Art. 122 of the Limitation Schedule has been designed for such a claim.

Art 122, Limitation  
Schedule.

The necessity for a new suit arises only because the original decree is infructuous.

There is only one decision of the High Court of Bombay, reported in I. L. R., 20 Bom., 385, already noticed, which lays down, contrary to the Madras decisions just referred to, that as between a father and his sons, a decree against the former is quite capable of execution against the latter as a direct logical sequence from *Giridharilal's* case, the only right and the remedy of the sons being, by way of objection, to show the illegal and the immoral nature of the debt. If there is no such objection, or if it fails, the decree is executable against the ancestral estate in the hands of the sons without the necessity of a fresh suit. How far the Bombay view will be accepted and followed by other Courts is more than what we can say. But the Bombay case is only one relating to father and his son. Independently of that isolated judgment, and taking the broader question of the coparcenary of all classes of people and of relations, the question still remains as to the period of limitation for a new suit for a fresh decree against the survivors under the circumstances indicated above ; namely, if the original debtor was the manager and the debt incurred by him was a legal necessity. The broad question will, of course, include the case of father and his son : and it need hardly be observed, that if the above-quoted Bombay view is the correct law, and the current view of other High Courts is erroneous,—a view to indicate the necessity, and the possibility for a new action, the question of limitation will hardly arise ; because a new suit is forbidden by the provisions of Sec. 47 of Act V of 1908. But if we regard the Bombay ruling as an unauthorized and an illogical straining of *Giridharilal's* case, offending against the prevailing doctrine of survivorship under the

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1. *Chetha Kalan v. Govinda*, 17 Mad., 186.

Mitakshara law, and repugnant also to the principles embodied in the Procedure Code, the possibility of a new suit to follow the estate in the hands of the survivors remains to be considered in relation to the question of limitation just

New suit when not necessary. raised. Of course, no new suit need be filed,

if the decree had gone so far as to attach the estate before the death of the debtor,<sup>1</sup> though attachment before judgment may not have that effect.<sup>2</sup> After a complete vesting of right by survivorship, it would hardly be legal to proceed against

the survivors under Sec. 50 of the C. P. Code, or to call them legal representatives of the deceased in possession of his estate.<sup>3</sup> With

Act V of 1908, Section 50. respect to any separate estate, perhaps, the deceased's widow may be called his representative when the bulk of the estate descends by survivorship.<sup>4</sup>

Reverting, then, to the limitation question, it is apprehended that Art. 122 of the Schedule is not applicable, because that article refers to a suit upon judgment, and under the Civil Procedure Code, no second suit lies upon a previous judgment in British India. We feel compelled to observe that it is very difficult to conceive the kind of suit upon judgment in British India which this article has been intended for. Limitation cannot possibly create any new cause of action, and the bare insertion of an article like this cannot possibly override the bar of *resjudicata*.<sup>5</sup> Leaving out of consideration all previous conflicts of opinions as to the nature and the scope of this article, we will quote only one ruling<sup>6</sup> of the Bombay High Court, whereby it has been held, after reviewing a large number of previous decisions on the subject, that no such suit lies under this article.

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1. Sec. 50 C. P. Code. *Gajanan v. Yadu*—J. C. Digest of Rulings, Part VIII, No. 17; *Karnataka v. Andu*, 5 Mad., 232 F. B.; *Beni v. Parbati*, 20 Cal., 895.

2. *Ramanuyya v. Rangappayya*, 17 Mad., 144.

3. *Lachminarayan v. Kunji*, 16 All., 449; 10 Mad., 283 F. B.; 12 Bom., 50; *Jagannath v. Sitaram*, 11 All., 302; *Suraj Bansi v. Sheoprasad*, 5 Cal., 148; *Rai Balkessi v. Rai Sitaram*, 7 All., 731; *Bal Bhadar v. Bisheshur*, 8 All., 495.

4. *Nanabhai v. Janardhan*, 16 Bom., 636.

5. *Jivi v. Ramji*, 3 Bom., 207, 209.

6. *Merwanji v. Nowroji*, 8 Bom., 1; Vide also *Ramayya v. Venkat*, 17 Mad., 129, para 2.

The Madras case just cited and a decision of the same Court a year before,<sup>1</sup> contain an interesting discussion, in two separate Benches of the Madras High Court, of the law of limitation applicable to such cases. The omniaibus clause of article 120 was naturally resorted to; but discrepant opinions were expressed as to the time from which the period of 6 years was to take its start. The result of the discussions seems to be that the stipulated date for the repayment of the loan is the criterion in the first instance, and that if the debt had become overdue when the deceased died, limitation begins from the date of his death. It is not difficult to conceive the difference. In ninety-nine cases out of hundred (instalments still to fall due being the exceptional sort of cases as in one of the Madras decisions), the debt falls due before the death of the managing debtor,—or else how could decree be passed? Therefore the immediate right to sue accrues upon the lapsing of estate and setting in of the right of survivorship. The view of the matter reported in the sixteenth volume of the Madras series considered, but not dissented from, in the late decision, is the one more reasonable to follow. It would be unreasonable to hold that the obligation to pay the debt, as evidenced by the original contract of loan, constitutes the sole cause of action against the survivors. That undoubtedly is the foundation for the action. But the debt and the original cause of action are merged in the decree. The personal covenant between the contracting parties has become the debt of record; after which the death of the judgment-debtor, the accrual of rights by survivorship in conjunction with the legal necessity for the debt, and the benefit to the estate, are the elements that combine to give to the creditor a fresh cause of action involving new pleadings, new trial, and a fresh decree. For a simple debt like this, the rights and liabilities of the debtor extinguish on his death, and the surviving members do not get the estate by descent: it simply lapses.<sup>2</sup> On the other hand, the undivided family property in the hands of surviving coparceners is liable for those debts of a deceased coparcener which were incurred on behalf of the family.<sup>3</sup>

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1. *Natasayya v. Pannusanji*, 16 Mad., 99.

2. *Debi v. Thakur*, 1 All., 105.

3. *Narsing v. Chinapa*, 3 Bom., 479.

To avoid these risks and difficulties, it is necessary to consider what should be the framing of the suit and of the decree in the case of personal loan contracted by the managing coparcener for legal necessity and family benefit. This is an important point for consideration, and we propose to deal with it by the light of case-law on the subject.

In a Madras case,<sup>1</sup> the question for reference to the Full Court was, whether the suit on a bond executed by a Hindu father, impleading the sons in the action, was one of the nature of Small Causes. The Full Bench decided, it was not, but the Division Bench laid it down as an *obiter* that the decree against the sons on such a personal contract was bad. It is hard to reconcile this view of the matter with the principles of subsequent decisions to be noticed hereafter. The borrower in the case in question was the father.

The debt, it is true, was not shown to have  
 Father's debt: son a party. been incurred for family or legal necessity,

but it was neither shown to have been immoral nor illegal. The decree against the sons *in personam* could not, certainly, be passed. But it has long been held that for father's debt, a personal decree against him and decree against the sons to the extent of the assets, could undoubtedly have been maintained. The argument of the counsel, quoting a passage from Mayne's Hindu Law to the effect that the son is not liable or bound to pay his father's debts during his life-time, is the very reverse of what has been laid down in *Laljee v. Fakeerchand*, I. L. R., 6 Cal., 139, which runs thus:—"But by the decision of the Privy Council, it has been established that it is the pious duty of the son to pay his father's debts out of the ancestral estate even in the father's life-time." Then again a Division Bench of the Allahabad Court<sup>2</sup> has ruled that the sons in a joint Hindu family are liable to be sued, along with their father, upon a mortgage bond, given by the father alone, after the sons were born, the consideration being antecedent debt advanced to the mortgagor, not as a manager of the family, or with the authority of the sons, or for family purposes,

1. *Narasingha v. Subha*, 12 Mad., 139.

2. *Badri Prasad v. Madanlal*, 15 All., 751. See also *Baboo Sing v. Behari*, 30 All., 156.

but not for purposes of immorality or for purposes which, if the father was dead, would exonerate the sons from the pious obligation of paying such debts of the father. The usual sale-decree under Sec. 88 of Act IV of 1882 was passed against the father and sons. Compare also *Kesho v. Haridas*, I. L. R. 21 All., 281.

The same rule would undoubtedly apply to the cases of secured and unsecured debts incurred by the father or by any other managing coparcener for family purposes. The necessary debts are binding not only on the borrower but also on those members or persons whom the borrower can put under the obligation and the liability therefor by virtue of his position which implies direct or indirect consent of all concerned. The natural or the self-constituted leader and director of the family affairs, known under the designation of manager, whether he is installed in the office he occupies by reason of his birth and position in the economy of the family, or whether he holds the reins of the family concerns under the pressure and the necessity of its circumstances, is unable to retain his *status* for a single moment, if the implied consent and sufferance of the other members is withdrawn or is shown to be wanting. A manager is the most essential adjunct to the joint family system, as the arrangement is of the greatest necessity and convenience for the peace of the family and for its smooth working. This is true of any other kind of joint concern one can think of and not merely of joint families of Hindus. We have seen the subsequent complications, which arise if a person dealing with the representative of the family prosecutes his remedies against him alone. The complications always tend more or less to his disadvantage or loss. To avoid these risks and difficulties, the procedure suggested in the preceding paragraph is the best to follow. There have been many early rulings of Courts in which the error and the omission to take proper pleadings, and mistake in the framing of the suit, and impleading proper parties, have led to the most disastrous results, and not unfrequently, to wrong conclusions. We now proceed to notice some of the cases below.

In *Ramdyal v. Durga Singh*, I. L. R. 12 All., 209, decree was passed against the father alone. In execution thereof, joint ancestral property belonging to the father and the sons was attached.

The sons, as third parties, objected to the attachment, under the provisions of Sec. 278 of the Code. Their objection having been disallowed, they instituted a regular suit (a procedure not permissible under the logical effect of the Bombay ruling, in the 20th volume, already pointed out) under Sec. 283 of the Code, for a declaration that out of the properties attached, they (sons) were entitled to a four-fifths share and to its release from attachment and sale. They also prayed, as against the defendants (the decree-holder and father judgment-debtor presumably) for partition and separate possession to the extent of their shares. They further pleaded non-liability stating that the debt and decree were not for family necessity, and therefore, not binding; and that the loan was in furtherance of illegal and immoral purposes. Thus, the plaintiffs (sons), put forward an extensive and an exhaustive case of their own to conclude all disputes and to settle all possible controversies. The defendants joined issue on all the points raised. The learned Judges of the High Court (Straight and Brodhurst, JJ.), following an earlier decision of the same High Court<sup>1</sup> (as per Edge, C. J. and Tyrrel, J.), which, in its turn, relied on an earlier ruling<sup>2</sup> (per Petharam, C. J. and Straight, J.), came to the conclusion that the sons' claim should be, and it was accordingly, decreed. Here, then, we have got a consensus of opinions of five High Court Judges, one of them subsequently the Chief Justice of the High Court of Calcutta, affirming a principle utterly subversive of the powers and the duties of the manager of the family on one hand, and the rights of *bona fide* and honest lenders of money on the other. A broad and a sharp line of distinction was attempted to be drawn by the learned Judges, in the aforesaid cases, between the effects of a decree for and sale upon mortgage executed by the father, and those of simple money-decrees upon bonds or parol debts and obligations. This was held to be a distinction without any difference. If the decree was for a debt of legal necessity against the *karta* or the manager of the family, (in the case before us the decree was against the father who was acting as the head of the family), and steps were taken to execute the decree in his life-time, the whole joint estate may be followed for its recovery.

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1. Balder Singh v. Ajudhia, 9 All., 142.

2. Basamal v. Maharaj Singh, 8 All., 205.

The result of the Allahabad cases quoted above is to lay down a questionable principle, namely, that if the decree was a personal one against the father, or for the matter, any other coparcener, and an attachment in execution is taken out after his death, the sons or other members may either successfully object to the attachment, or, failing therein, may institute a regular suit and get their shares released, without entering into the question of legal necessity, or allowing the same to be raised. The decisions of the Allahabad Court, in question, have altogether ignored the fact, that in a suit of this nature brought either after objection proceedings or instituted directly upon the death of the judgment-debtor,—both possible contingencies under ordinary circumstances,—all the grounds of controversy are opened up between the parties, and it is impossible to understand how and why should the defendant (decree-holder) be shut out from demanding the trial of the issues as legal necessity, morality, or otherwise, of the debt in question. It has been ruled<sup>1</sup> that all the grounds of attack or defence are available in a suit properly constituted after failing in the objection proceedings. It must, however, be noted that the other rulings of the Allahabad Court referred to in I. L. R., 12 All. 209, do not go the full length of laying down the fanciful distinction already noticed. In so far, then, as the decision has the effect of precluding the decree-holder from suing the sons or other parceners again on the decree, founding the cause of action on the ground of legal necessity or freedom of the debt from immorality, as the case may be, the decision is hardly an authority of much weight.<sup>2</sup>

On the other hand, the High Court of Bombay, as we have seen more than once, in its decision, as reported in the case of *Umed v. Goman*, I. L. R., 20 Bom. 385, has expressly dissented from the reasonings of the Allahabad and the Madras Courts in relation to the procedure by way of suit which these Courts enjoin to enforce a debt under a decree against the father who is dead. The debt which culminated in the decree may be either personal to the

1. *Murli v. Bhola*, 16 All., 165 F. B. *Radha v. Shamlal*, 23 Cal., 302.

2. These rulings have been overruled by *Karan Singh v. Bhup Singh*, 27 All., 16 F. B.



father or communal, that is, due by the whole family. The High Court of Bombay, by ruling that the objection by the unimpleaded sons falls within the purview of Sec. 244 of the old Code of Civil Procedure has brought the whole fabric of subsequent litigations or a new action founded on the decree against the deceased father within the range of the execution proceedings. One would naturally feel inclined to fall in with this view when it is remembered that the personal decree against the father, untainted by immorality, carries with it the legal incidence of its being enforceable against the ancestral estate in the hands of the sons.

Between these divergent views of High Courts, there is a deep and wide gulf, mostly occupied by the ad-  
Proper course of action against a coparcenary on manager's act or indebtedness.jective law of procedure. In point of absolute principle, result, and the remedies, there is no substantial difference, with the exception of the isolated ruling of the Allahabad Court in volume XII. While the easier process, indicated by the Bombay High Court, is tempting, the same goal is reached by adopting the courses which the Allahabad and the Madras cases have laid down. *Vide* also the judgment of the Calcutta High Court in *Radha v. Shamlal*, I. L. R. 23 Cal., 302. These courses, which are perhaps strictly speaking more legal, are undoubtedly circuitous, troublesome, and expensive, with all the attendant risks and difficulties. The safest procedure, therefore, is to bring an exhaustive and a representative action after impleading all the members and the coparceners who, and whose estate, are sought to be rendered liable. The procedure, suggested, will enable the Courts to steer clear of the aforesaid conflict between the Courts of Bombay and of other places. The debts on bonds, acknowledgments, mortgages, parol obligations, and liabilities of all sorts, incurred or contracted by the father, the manager, or the *karta*, constitute by far a large percentage of our civil litigation. More frequently than not, the liability is sought to be saddled on the coparcenary and their estate, and that object can be best secured by a judicious framing of the suit, proper pleading and full marshalling of the necessary parties. It need, of course, be hardly said that for an unsecured personal debt of a coparcener, other than the father, when such debt is not connected with any legal

necessity of the family, there is absolutely no remedy after the death of the debtor unless he had left separate estate of his own that can be followed in the hands of his legal representatives.

If an alienation is made by a managing member, the other cosharers will not be bound, unless it is shown that it was made with their consent, express or implied. In cases of implied consent, its existence may be presumed or deduced from the general consent as to management because the other members of the family by entrusting the family concerns, must be presumed to have delegated to the manager the power of consulting the general welfare of the family and its needs and also of pledging the family credit. In ordinary matters of family necessities, and in special cases of urgency the manager is supposed to have the consent of all. These principles have been laid down in an important Calcutta decision<sup>1</sup> which considered and reviewed many early rulings on the subject. The object of the loan was, to pay off heavy litigation expenses upto the Privy Council in an action by no means imprudent or unnecessary. It appeared that the case involved very knotty and difficult questions of adoption, and that legal aid was to be obtained with heavy pecuniary sacrifice.

When such cases arise, the question as to the burden of proof sometimes stands in need of decision. The lender, to make the family property liable or to make the coparceners jointly and severally responsible for the debt, has to prove two things independently. *First* that the borrower was the manager. *Secondly* that the loan was for a family purpose. There is no necessary presumption that a loan contracted by the manager of a joint Hindu family has been contracted for legal necessity.<sup>2</sup> The Court below in the case cited, having decided in favour of the lender on the wrong basis as to the burden of proof, the High Court reversed the decree and remanded the suit for fresh decision.

1. *Miller v. Raghunath*, 12 Cal., 389.

2. *Soiru Padmana v. Naraydu*, 18 Bom., 520. See, however *Krishna Ramaya v. Vasudeo Venkatesh*, 21 Bom., 808.

Where management vests in more persons than one by consent, family arrangement, or by implication, one of them cannot create a valid charge in defeasance of the rights of others. In such a case, the plain course of the charge-holder is to implead all the necessary parties ; and if his action is grounded on legal necessity, the fact that one of the acknowledged managers had created the charge will avail him a good deal to secure the property. It is not necessary to repeat the probable risks of a half-hearted or imprudent action of a hole-and-corner style. The non-impleaded coparceners will intervene and hamper the creditor at every possible step ; and in the end he will find himself out of pocket enormously, and a loser in the bargain. This is the practical result of the Bombay decision.<sup>1</sup>

The Courts of Law feel generally inclined to allow all reasonable latitude to the manager in the exercise of his powers to enable him to make valid disposals for urgent and pressing necessities. The manager should, in all fairness, have his rights as well as his risks and responsibilities. He cannot, of course, silence enquiries and drown criticisms by barely reciting in the deed the necessity for the alienation. Such recitals are, by no means, of great weight, or perhaps, any evidence of legal necessity.<sup>2</sup> Necessity is a question of fact, and it must be proved by the party relying on its existence. On the point of *onus*, just considered, the Subordinate Courts in the country commit occasional mistakes. *Vide* the decision of the first Court in *Venkata v. Vishnu*, I. L. R., 18 Bom., 534. It was the case of a widow who, mainly for the payment of a mortgage-debt that existed, but had not fallen due, and partly for her own maintenance, sold the estate to the mortgagee. The Court held that there was no immediate pressing necessity for the alienation, but the Court did not allow the reversioner to scrutinize too closely her powers and to interfere with her discretion, which the High Court of Bombay held to rank in the same way as the discretion of an ordinary manager of properties.

1. *Govind v. Lakshman*, 18 Bom , 522.

2. *West and Büller*, Vol. I, Introd, p. 102.

I had occasion in the foregoing chapter, to discuss and to comment on two recent decisions passed by the Judicial Commissioner at Nagpur<sup>1</sup> regarding the claim for redemption of mortgage after the sale absolute in foreclosure proceedings in an action against the surviving representative members of the family after the mortgagor's death. I had reasons to remark,—and to that opinion I still adhere,—that the aforesaid rulings were unwarrantable departures from the current authoritative views on the subject. The Courts no doubt at one time were inclined to hold, especially in the case of a Joint Hindu family governed by the Mitakshara law, that only the right, title and interest of a father or other manager passed to the purchaser at a sale in execution of a decree against him, and that the interests of his sons or co-sharers, not parties to the record, remained unaffected. But the great change of views that has since come over, on the authority of the more recent decisions of the Privy Council and of the High Courts of India, has considerably shaken the *dictum* in Deen Dayal's case.<sup>2</sup> A true and an elaborate exposition of law on this subject will be found in a decision by Ranade, J. of the Bombay High Court.<sup>3</sup> It was the case of a mortgage by a Mahomedan father who died leaving a widow, a minor son and two minor daughters. The mortgage was by conditional sale. The creditor foreclosed the mortgage and got the sale absolute in his favour by a suit in which he impleaded the widow and the minor son as defendants to represent the deceased debtor. Many years afterwards the daughters, on attaining majority, sought to redeem the mortgage on the sole ground that they, as residuaries, had vested interests in the property and that not having been made parties in the original suit, they were entitled to redeem the mortgage and to recover the estate on payment of the mortgage-debt. I believe they were tempted to do so by reason of the increase of valuation of the land which they sought to recover and

Representative action on mortgage, no subsequent redemption.

Mortgage-debt by Hindu or Mahomedan father or manager representative action binds all.

1. Dindayal v. Sheoraj, 2 N. L. R., 116; Ghasiram v. Jhingwa, 4 N. L. R. 168.

2. Deen Dyal v. Jugdeep Narain, L. R., 4 I. A., 247.

3. Davalava v. Bhimaji, 20 Bom., 338. See also Palani v. Rangayya, 22 Mad., 207.

they knew fully well that if they were entitled to the relief, their liability for interest for nearly 26 years (the mortgage was of 1864 and the redemption suit was filed in 1890) would be more than counterbalanced by the accumulating mesne profits. They raised the contention that they had 60 years' period of limitation for redemption and that the former proceedings were no bar to their claim. The learned Judges of Bombay following numerous decisions of Courts including those of the Privy Council, held first that there was no distinction in principle between the vested interests of the sharers and residuaries under the Mahomedan Law of succession and the rights of Hindu coparceners in joint or ancestral properties. In the next place it was held that the call for the payment of the ancestral debt is not less onerous or binding on a Mahomedan heir than on a Hindu son or brother. It was held further that the mother represented the deceased debtor in such a representative manner as to bind all the heirs by the result of the suit against her. If this be a sound view of the law, I fail to draw any distinction between this case and the claim for redemption on the part of a son or of any junior member in a coparcenary on the sole ground that he was not impleaded in the former action. The Court is bound to look below the surface and to decide for itself whether, harring petty technicalities, flaws or omissions, materially and substantially the previous action for foreclosure or sale was or was not of a representative character. I fear it would ordinarily be presumed that it was so. Otherwise the titles and proprietary interests in landed estates settled over last half a century, would be rudely upset and imperilled by following the extraordinary line of action that was adopted in the two Nagpur cases quoted above.<sup>1</sup> It is only in exceptional cases that the sons have a right to claim redemption after the mortgage has been reduced to a sale by the father in a manner not consistent with family benefit or the strict legal necessity of the case. An instance of this sort would be

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1. Recently the Judicial Commissioner at Nagpur has in a way viewed with doubt the soundness of some of the early rulings of that Court and of other High Courts. But it appears to me that in the face of the law propounded by Sir B. K. Bose, it was not necessary to consider the question of *onus* and to dismiss the claim on that shaky ground. Because a claim of this sort was repugnant to the more substantial Hindu law as settled by the Privy Council—See *Jian v. Gopadya* 5 N. L. R., 117.

found in a later Bombay decision<sup>1</sup> where the father converted a redeemable mortgage into an alienation for a long period in favour of the mortgagee and thus imposed a fetter on the sons' rights to redeem their ancestral property from the mortgagee. It was found, as a matter of fact, that the father's alienation was brought about by a consent decree which is not the same thing as a decision after a fair fight on a fair trial, and that the arrangement that was effected involved a serious loss to the family on account of the excess payment in favour of the mortgage.

In another case,<sup>2</sup> the Bombay High Court has held that where family property is sold in execution of a decree obtained against a brother as manager of a joint Hindu family, for a family debt contracted by his father and himself and a brother, the interest of all the members of the family passes to the auction purchaser, though they were not joined as parties to the suit or to the execution proceedings. The family consisted of a father and five sons, some adult and others minors. The debt was founded on an acknowledgment (khata) passed by the father and his two sons. After the father's death, and during the absence of one of the brothers, the creditor sued and got a simple money-decree against the other brother. It was an ordinary money-decree, and it does not appear from the report either that the suit was framed or that the decree was passed against the defendant in a representative character. In execution of that decree, certain fields which were the joint ancestral property of the family were sold and purchased by the decree-holder. This was certainly a defective procedure and a faulty litigation; and the result was that the other unimpleaded coparceners found a loop-hole, and brought a suit to rescue their share. It was established by the defence that the judgment-debtor was the actual manager of the family, and that the debt was a family necessity. Consequently the Court held that the entire estate passed. Conversely then, if before the sale the unimpleaded parceners had objected and secured a release, *pro tanto*, of their share, the decree-holder could undoubtedly base his action on the decree, and, by proving the same facts which he had to do as a defendant in the above case,

1. *Bala v. Balaji*, 22 Bom., 825.

2. *Bhama v. Chindhu*, 21 Bom., 616.

arrive at the same result. The view of the High Court was supported by many rulings cited at the bar.

I will refer to two decisions of the High Court of Madras wherein the question was discussed as to whether, on a personal obligation for debt incurred by the father or by the manager such debt being for family necessity, the sons and the other junior members of the family could be impleaded in one suit based on the personal covenant to pay. A Full and a Divisional Bench of Madras<sup>1</sup> have decided the question in the affirmative. The reasons therefor are too clear for detailed consideration in this place. It is a matter of common experience that for debts of legal necessity incurred by the father or by the managing coparcener, the sons or the other members in the coparcenary are impleaded in order to recover the debt from the joint estate. In the case of the father there is the additional burden imposed by the consideration of the sons' pious obligation to pay the debt. In the second case cited above the learned Judges have discussed at some length the question of the personal obligation of the non-contracting parties to pay the debt. After considering the texts of law on the subject and the settled view of Courts, the learned Judges came to the conclusion that the obligation on the part of the sons or of the other junior members of the family must be restricted to the joint assets they all hold. For a debt of legal necessity or for family benefit the individual members are not personally liable. But to what extent their self-acquired property would be answerable for such an obligation was not a matter for the direct decision of the learned Judges.

Mayne in para. 304, page 390 of his book on Hindu Law, Seventh Edition, discusses at full length the prevailing view in India with respect to the nature of the decree that can be passed first, against the son for the debt incurred by his father; and secondly, against the coparceners for the debt incurred by the manager. It has been pointed out that the course

Debt of legal necessity. Decree against father or manager and against sons and coparceners.  
Debt of legal necessity. Decree on assets. Personal obligation, when?

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1. *Ramasami v. Ulaganatha*, 22 Mad., 49 F. B. *Chalamayya v. Varadayya*, 22 Mad., 166.

of decisions in Bombay followed a stricter and a more technical interpretation of Hindu law and saddled a personal liability on the son for the debt of his father even though no assets were inherited. Gradually, however, the decisions of Bombay were brought in conformity with those prevailing in the rest of India, till it became the settled view all over the country that a legal debt incurred by the father or a debt of legal necessity contracted by the managing coparcener stood precisely on the same footing in reference to the recovery of the debt from parties other than those who contracted them. Where such debt benefited the family the joint or ancestral effects were liable therefor: it being always understood that the separate property of the son or of the coparcener is not available to the creditor for the realization of such debt. In the second Madras case quoted above, Subramania Ayyar, J. has observed as follows on the subject now under consideration:—I. L. R., 22 Mad. 166 (167),—"No doubt, where it is shown that the contract relied on, though purporting to have been entered into by the manager alone, is in reality one to which the other coparceners are actual contracting parties either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, had subsequently duly ratified and adopted it, in that case unquestionably every such coparcener is absolutely responsible. Equally he would be responsible, though he did not assent to the particular contract, if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered, as to warrant his being treated in the matter as a contracting party. When, however, such is not the case, but the contract is of a character such as, under the law, to entitle the manager to enter into, independently of the consent of the other members of the family, so as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property. As regards the other property in the hands of a coparcener, no other coparcener, whether he be the manager or not, has any title whatsoever. The legal individuality of a coparcener is not merged in the manager, so far as the coparcener's self-acquired or other separate property is concerned. Even when, under the Hindu Law, according to the



Smrities, the family was paramount, it did not entirely absorb the legal individuality of the members of whom it consisted." The above extract from the Madras case does not contain an exhaustive enumeration of all possible cases of personal obligations created in joint families. Only a broad outline of ordinary cases of personal obligations has been sketched out by the learned Judge by way of illustration. In the next chapter of Guardians of Minors and of other fiduciary relations who contract debts or incur obligations of legal necessity or benefit for others, the matter now under discussion, namely, the cases wherein the assets and the cases wherein the persons as well, are liable, will be discussed at some length.

If in a joint family a debt of legal necessity is contracted by the manager by passing to the creditor a cheque, a hundi or a promissory note, then, in the opinion of Davis, J. a suit will not lie against the other members of the family on foot of the negotiable instrument.<sup>1</sup> This is on the technical

Negotiable instrument, debt of legal necessity, liability of the family, representative suit.

reading of the provisions of the Negotiable Instruments Act read by the light of the corresponding English Act. It is said that the Act enjoins no liability against parties whose names do not appear on the face of the instrument. But the other two Judges of the Madras High Court dissented from this view and held that the debt being founded on family necessity it made no difference whether a bond or a hundi was passed for the consideration. In India the personal law of the parties imposes on the family the obligation to pay the necessary debt. The creditor in the case drew out the frame of the suit in a fully representative manner by setting forth the purposes for the debt, the benefit which the family as a whole derived and the managership of the debtor. In this case the debtor was a junior member of the family, a nephew, whose uncle and the latter's sons were all impleaded for being charged with the liability for the debt. The plaintiff's claim was decreed. The learned Judges followed a Calcutta ruling<sup>2</sup> which laid down that "Lalji and Sitaram, though not the managers of the family, were yet its accredited agents in the management of the money lending business, and as such had the authority of the

1. Krishna Ayyar v. Krishnasami, 23 Mad., 597.

2. Sheo Pershad v. Saheblal, 20 Cal., 453 (461).

other members to pledge the family property for a joint debt contracted apparently in the ordinary course of that business." Seniority of age or of relationship, more advanced education, rank in public office,—nay the supreme personal respect that is commanded in the family—are not the necessary tests of managership. No ceremony of formal installation in the management of the estate ever really takes place. It is a matter of evidence in each case for the party to plead and for the Court to decide whether a particular member of the family acted for the time being with the express or implied consent of all as the manager of the family for the purposes of the transaction. When a party sues or is sued in that

Objection for want of parties. O. 1, R. 13, Act V of 1908.

character, objection for not impleading the other coparceners is regarded as futile, and if an objection of this nature is taken at a late stage of the case the Court is not bound to entertain such objection.<sup>1</sup>

It would appear from a decision<sup>2</sup> of the Privy Council that neither a widow nor any other person with delegated authority of management from her can silence the enquiries of the reversioner complaining against an act of alienation. Their Lordships have made a distinction between the powers of an ordinary manager in a coparcenary and those of a manager with delegated rights from a restricted interest holder. It has been pointed out that in the former case, consent expressed or implied will validate the transaction, and that in the latter, consent and proof positive of legal necessity are essential. In either case, of course, where consent or concurrence is wanting, discussion as to the quantity or quality of proof as to legal necessity is rather metaphysical than real. In both cases, legal necessity must be established to validate the transaction.

Widow etc. manager vs. Male manager.

The gradual development of thought in the High Courts of Allahabad, Calcutta, Bombay and Madras on the subject of a new suit founded on a previous decree passed against the father or a single coparcener in charge of the management of the family property or not, is a very interesting and instructive reading. I have abundantly made

1. *Paramasiva v. Krishna*, 14 Mad., 498. *Ooma Sundari v. Ramji*, 9 C. L. R., 13.

2. *Shamsundar vs. Achhan Kunwar*, 21 All., 71 (83).

Decree against father or against a coparcener for debt of legal necessity. Risks for a new suit on the decree.

it clear that it is always safe and advisable to frame a full and representative action on the cause of action against the father or against a single coparcener by impleading the sons and the other members in the first instance. References to this subject have been amply made in this and in the foregoing chapters. See, for instance, the case of *I. L. R.*, 23 Mad., 597, quoted already. In the case of the decree against the father alone, the prevailing view of Bombay, as a departure from the views of the rest of India, has also been noticed. The rulings of the Madras and Allahabad High Courts have been dissented from in Bombay.<sup>1</sup> The point of difference is not one of principle or in violation of the doctrine of legal necessity or of the pious obligation of the sons to repay their father's debt. In this respect it would make no difference whether the father died leaving ancestral property or the joint property of the family. But the difference of opinion is mainly restricted to the consideration of the adjective law of procedure as to whether a new suit would lie or the execution of the original decree should proceed against the sons. Barring this aspect of the discrepancy, we find it clearly laid down in the Allahabad case cited above that a new suit against the sons could be filed by the decree-holder. See also *Dharam v. Agnan*, 21 All., 301. It is said in the last mentioned case that although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay. The creditor may in his original suit implead the son, but his omitting to do so will not deprive him to his subsequent remedy against the son. There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt. That the same view prevails in Madras has been clearly set forth in the preceding pages. But in a coparcenary of joint and undivided members in a Mitakshara family the High Court of Calcutta considered a case of a decree passed against a member for rent on a lease executed

1. *Ariabudra vs. Dorasami*, 11 Mad., 413. *Lachmi Narain vs. Kunjilal*, 16 All., 449. *Uned Hathising vs. Goman Bhaiji*, 20 Bom., 385.

by him.<sup>1</sup> We will presume that the benefit of the lease accrued to all the members. The subsequent complications that arose upon and after the execution of the decree against the tenant and the family estate will appear from the decision quoted above. It is not quite intelligible to me why in the subsequent regular suit instituted by the decree-holder in order to render the other coparceners' estate liable for the decree he should not succeed on the ground that the latter had not been impleaded as defendants in the original suit which resulted in the decree in execution. The report of the Calcutta case under consideration is unfortunately silent on the question of evidence that was adduced in the new suit. For aught that I can say, it was wrong to hold that Ramanund, the recorded lessee, was not sued in his representative capacity, provided it was found on evidence that the other members were joint with him. In his learned judgment in a subsequent case of Calcutta,<sup>2</sup> Bannerji, J. has subjected the aforesaid

Coparcener a tenant  
or *Ijaradar*. Represent-  
ative capacity.

decision of Ghose and Princep, J J. to the test of severe scrutiny and it has been held that the decree-holder or the auction purchaser can in a subsequent action successfully maintain the plea that the original judgment-debtor was sued in his representative capacity and that the debt or the demand was one of legal necessity that is binding on the entire coparcenary estate. Most, if not all, of the earlier decisions of Calcutta, referred to in both the aforesaid rulings, support my view. I do not confine my remarks to the cases of sales of the tenures the rent of which was originally sued for. In that case obviously the entire tenure would pass. When the tenant or the *Ijaradar* who is a member of a joint Hindu family is sued for rent, there can be no question that in respect of his relationship to the landlord the defendant is sued as a representative of the family. In Provinces such as the Central Provinces and Berar, where some of the tenures are not saleable in execution of decree, it would be absurd to contend that the other members of the joint family who were benefitted by the tenancy are not liable for the decree if proceeded against in the same manner as in the Calcutta case just cited. If the tenant of such a holding dies after the passing of the decree for rent, the joint estate in the hands of the

1. Radha Pershad vs. Ramkhelawan, 23 Cal., 302.

2. Nitayi Behary vs. Hari Govinda, 26 Cal., 677 (683).

survivors can be made liable by instituting a suit on the basis of the rent decree.

I have more than once indicated the broad distinctive feature in the case-law of India on the subject of the alienation by a single coparcener of his interest in the whole or in part of the joint family property.

Personal debt or decree of no legal necessity, effect of alienation.

The distinctive line runs, as it were, along the entire range of the Vindhya hills. In the Cis-Vindhian Provinces of the Deccan, the transfer of a co-sharer of his own interest in the joint family property is valid and is given effect to, if the said transfer is caused for consideration not connected with any family necessity. But from an early time in the Trans-Vindhian Provinces of Upper India including Bengal, the United Provinces and Oudh where Mitakshara prevails, the ruling of the Calcutta Full Bench<sup>1</sup> case prominently marks an epoch in the departure of views in this respect; that is to say, such a kind of transfer conveys no interest in favour of the alienee. But throughout the country there is no difference of opinion, if the individual interest of a single coparcener is brought about under the pressure of execution of decree by Court. This, as explained already, is the result of the leading Privy Council cases which have been previously quoted.<sup>2</sup> The matter for consideration now is what are the rights and remedies of the transferee and of the other members in the coparcenary if a single coparcener brings about or causes the alienation of his interest for no legal necessity of the family? I will answer the question by the light of cases which must be regarded to be in force up to the present time. In a Madras case and in a case from the Province of Oudh which went up before the Privy Council<sup>3</sup> instances will be found of the prevailing doctrines mentioned above of both these Provinces. I am not concerned with the complicated question of the partition proceedings which an alienee is entitled to institute to enforce the equities of the transaction in his favour. Equally I am not concerned with the rights and remedies which the other co-sharers have to interdict or to give effect to the partial transfer of his interest by a single coparcener for

1. *Sadaburut Sahoo v. Follbush Koer*, 12 W. R. 1, F. B.

2. *Deendyal v. Jugdeep Narain*, 3 Cal. 198 P. C.; *Suraj Bansi v. Sheoprasad* 5 Cal., 148 P. C.

3. *Sripati Chinna v. Sripati Suriva*, 5 Mad., 196. *Madho Parshad v. Mehrban*, 18 Cal., 157 P. C.

consideration not connected with any family purpose. This matter is quite beyond the scope of this book. It

No partial partition would, however, be sufficient to indicate that in allowable.

relation to such kind of transfer no suit in the nature of a partial partition will ever lie, either at the instance of the transferee or of the other united coparceners.<sup>1</sup> But let us suppose, as in the Madras case just cited, that there is a previous or a subsequent transfer effected of the whole interest in property under the pressure of legal necessity,—such transfer being brought about by the father or by the managing coparcener, it would undoubtedly prevail against the alienation by a single coparcener of his interest without any legal necessity.

Two decisions<sup>2</sup> of the High Court of Madras have pointed out the distinction between two kinds of claim. First, Alienation without necessity. (1) Coparcener's claim. (2) Alienee's claim. the claim by the alienee to enforce the alienation against the coparcenary; and secondly, the claim for recovery of the estate by coparceners other than those who alienate the estate. In the former, if the claim be for separate possession and severance of interest, the plea of partial partition arises, as far as the rulings go, as a fatal objection to the progress of the suit. It has been pointed out<sup>3</sup> that to enforce such a claim, it is impossible to take shelter under the provisions of Sec. 14 of the Transfer of Property Act, it being held that the important saving clause (Sec. 2, clause *d.*) precludes the infringement of any substantive rule of Hindu law, such as the rule against partial partition is considered to be. The above sets of rulings recognize the distinction between the stranger trying to break up the coparcenary and a coparcener trying to secure the *status qua*. But the contention on the score of partial partition may not always be taken. It is quite possible to conceive cases<sup>4</sup> in which the parties (coparceners), for reasons of their own, may elect to a kind of partition in

1. Venkatrama v. Meera, 13 Mad. 275. Venkayya v. Lakshmayya, 16 Mad., 98.

2. Subramanya v. Paduabhai, 19 Mad., 267. Venkayya v. Lakshmayya, 16 Mad., 98.

3. Koer Hasmut v. Sundar, 11 Cal., 396; Venkatram v. Meera Labai, 13 Mad., 275; Palani v. Masakonon, 20 Mad., 243.

4. Rangasami v. Krishnayya, 14 Mad., 408 F. B.

a certain property, and may confine their defence to other grounds touching the merits of the claim; or if both or all the coparceners respectively alienate<sup>1</sup> their interests to strangers to bring about a contest among the strangers *inter se*. There is, of course, no question of the legal necessity for the transactions or for any of them. In such a case, the prohibitive rule against partial partition does not stand in the way; because, *qua* that specific property the parties have elected to make a sort of division among themselves.

There seems no objection to the claim being made by the alienee for joint possession. It is only a claim for complete separation or severance of interest against which the plea of partial partition arises. If, for instance, a coparcener, having a definite share in some landed estate yielding profits, alienates his interest to a stranger for purposes of his own need, there can possibly be no objection to the claim being made for acquiring the status, temporary or permanent, of the alienor. The mortgagee or purchaser of a co-sharer may undoubtedly seek joint possession and apply to be recorded in the revenue register, and may enjoy the usufruct. But if he wants to sever all connection from the joint estate, he must, it is apprehended, adopt the procedure which has been well pointed out in an early ruling<sup>2</sup> of the High Court of Bombay;—that is to say, he must file an action for partition against the other members of the family for the ascertainment of the share of his vendor in the particular portion of the estate. In such a claim, although the general scheme of partition of all the assets and liabilities belonging to the coparcenary will hardly be allowed to be interfered with in the interests of a stranger, yet, as a party he can press the equities of his claim consistently with the interests of the coparceners; and he may either get the estate in suit or its equivalent in any form that the Court would think fit and proper. It has been held in a Madras decision,<sup>3</sup> that these complications and difficulties of the Mitakshara system do not arise in the case of Muhammedan heirs who have specific and vested shares in each item of property, resembling the notions that prevail under the Dayabhaga school of Hindu Law. Their Lordships, however, have observed, “No doubt there might

1. Subharazu v. Venkataratnam, 15 Mad., 23.

2. Pandurang vs. Bhasker, 11 Bom., H. C. R., 72.

3. Chandu vs. Kunhamed, 14 Mad., 324.

be cases in which a Muhammedan sharer would not be allowed to sue for his share in a particular item of property when he could in the same suit sue for his share in the whole property of the person under whom he inherits. But that is on a different ground to avoid multiplicity of actions."

The purchaser of the interest of one member of a joint Mitakshara family is affected in another way, if the alienation is not for legal necessity and binding on the coparcenary. We have just pointed out his remedy if he chooses at once to determine his right and to sever his interest from the coparcenary. The points we now propose to discuss apply to private as well as to judicial sales. The question is, does the purchaser acquire the full *status* of his vendor in the joint concern? It has been held that so long as the alienee does not take steps to fix and determine his rights these remain in a state of fluctuation subject to the incidence of fluctuations consequent upon new births and deaths in the joint family.<sup>1</sup> Both the cases cited are obviously instances of alienations by a member of his share, in which no question of entire alienation of property under the pressure of legal necessity by the member competent to do so, arose. These are converse cases. In the Full Bench decision, the number of persons entitled to come in as coparceners to the family property had increased between the date of the purchase and that of the suit. In the second case, reported in the same volume, an undivided coparcener died during the pendency of the suit instituted by the plaintiff (purchaser) for a declaration of his title, and for possession of the land purchased by himself. It was held in the Full Bench case that the share to be awarded to the plaintiff should be computed with reference to the state of the joint family *at the date of the suit*. Accordingly, the Divisional Bench effected a *pro tanto* diminution of the purchaser's right caused by the influx of new coparceners in the family. It would appear however, clearly from the referring order, and impliedly from the decision by the Full Bench that the converse proposition is also correct. That is to say, if the interest of the alienor had increased by the death or disappearance of some of the coparceners since the date of

1. Rangasami vs. Kishnayyan, 14 Mad., 408 F. B. Vireyya vs. Hanumantha, 14 Mad., 459.



alienation, and prior to the alienee's suing for the separation of his interest, the benefit of the alienor's acquisition of right by survivorship *quod* the particular estate purchased, would enure in favour of the purchaser, and he would be entitled to the *pro tanto* increase. This is exactly what has been really decided in the ruling reported in page 459 of the same volume. There, the plaintiff purchased the interests of one of three coparceners. The dying member's share lapsed, and was distributed between the two survivors. This was held to increase the vendor's interest by  $\frac{1}{2}$  of  $\frac{1}{3} = \frac{1}{6}$ . Had the sale not taken place, the vendor's interest in the land would have been, on partition,  $\frac{1}{3} + \frac{1}{6} = \frac{1}{2}$  : and this is exactly what was decreed to the plaintiff.

This view of the matter is wrong. In other words, the point directly decided by the Full Bench is the correct law ; but the converse proposition formulated in the referring order in the Full Bench case, and decided in the subsequent decision is not correct. The purchaser is subject to the liability of reduction of interest which the influx of vested rights introduces ; but he is not entitled to the privileges of survivorship which the efflux of vested rights brings about. This is exactly what has been decided in a Bombay case<sup>1</sup> after a careful and elaborate reasoning on the subject. Another Full Bench decision of Madras,<sup>2</sup> after reconsidering the earlier Full Bench case of the same High Court and reviewing many other decisions of Madras, and three leading Privy Council cases on the subject of enforced alienation brought about by the execution of decree against a coparcener, has laid it down that the alienee should not be regarded in the light of his vendor coparcener and the alienated interest is not subject to the equities and the incidence of the Hindu Law of the Mitakshara school which is introduced into the economy of the joint family by influx or efflux of coparceners. See the elaborate judgment of Bhashyam Ayyangar, J. in the Full Bench case cited above. The

Partition suit by coparcener's alienee.

facts of the case show the manner in which the coparcener's alienee can enforce his right by a partition suit. He was not permitted to institute a partition suit confining the scope of his action to the particular

1. *Gurlingapa vs. Naudapa*, 21 Bom., 797.

2. *Aiyyagari vs. Aiyyagari*, 25 Mad., 690.

item of property that was alienated by the coparcener,—a suit which the coparcener himself could not bring offending against the equities of partial partition. Such an action by the alienee, having been dismissed by the Court for this technical reason he brought a more comprehensive action embracing the interests of the entire joint property and claimed either the specific share purchased or its equivalent. In the aforesaid

Father a coparcener. Full Bench case, reliance was placed on the authority of the three Privy Council cases<sup>1</sup>

which laid down that the interest of a joint co-sharer in a Mitakshara family which is otherwise inalienable by a private transfer of the father as a coparcener for a debt or consideration that is not connected with legal necessity or a family need, is saleable in execution of decree against the father. The leading Privy Council cases were, it seems to me, more intended to assimilate the law of Upper India including Bengal governed by Mitakshara doctrines with those prevailing in Madras and in Bombay than to lay down, as a general proposition of law, that the interest of the whole estate will not necessarily pass for a debt against the father which is not illegal or immoral to exempt the sons from their liability. This has been explained by their Lordships in Nanomi's case, I. L. R. 13 Cal., 21 P. C. There is no lack of authorities in the Bengal cases in support of the principle that for valid debts incurred by the father the mortgage of joint property executed by him binds the sons and their interests in the estate.<sup>2</sup> There are again a series of rulings of the Allahabad High Court which have laid it down that for necessary and valid debts and alienations of joint estate effected by the manager or the *karta* of the family for legal necessity the sons and the other members, as the case may be, are liable. Indeed the Allahabad Court have gone the length of stating that a new suit would lie on foot of decree founded on legal necessity<sup>3</sup> so that in the Provinces where partial transfer of joint estate by a coparcener is not recognized as valid, transfer in part or in whole for legal or family necessity cannot be impeached.

1. Deendyal's case, 3 Cal., 198, P. C. Suraj Bansikoer's case, 5 Cal., 148, P. C. Hardi Narayan's case, 10 Cal., 626, P. C.

2. Prankrishna *vs.* Jadu Nath, 2 Cal. W. N., 603.

3. Jas Ram *vs.* Sher Lingh, 25 All., 162; Mashura *vs.* Ram Chadhra, 25 All. 57; Dharam Das *vs.* Angan Lal, 21 All., 301; Muhamamad *vs.* Radha Ram, 22 All. 307

In the same way it has been held in Bombay<sup>1</sup> that a mortgage for necessary debt executed by a *karta* binds the interests of all the members provided the debt is one of legal necessity. In such cases, if the frame of the suit is full and it sets forth the nature of the debt and the representative capacity of the obligor, it is a point of no materiality that the other members are or are not made parties in the case. Hence it has been held that the subsequent joining of the other members as parties does not affect the case on the score of limitation. Section 22 of the Limitation Act refers to the addition of a material party only.<sup>2</sup>

Whenever a new suit or proceedings are brought about at the instance of or against a non-impleaded party, after the decree or the conclusion of the execution proceedings, and the decree or sale is attempted to be supported as binding on such party, it is necessary to establish not only the legal character or position of the party suing or sued against, in the previous action but the legal necessity of the original transaction must also be again proved. This is the result of cases cited below.<sup>3</sup> In the latter case, the nephew succeeded to recover half the estate, the whole of which had been mortgaged by his uncle who was the admitted *karta* or the manager of the family. The purchaser at auction held on a sale decree, on foot of the mortgage, did not adduce any evidence as to the nature of the debt incurred by the mortgagor; but he relied on an irrelevant arbitration award in which the nephew was not a party and which recognized the binding character of the debt.

Among brothers, cousins, co-sharers and the like, disputes and dissensions give rise to cases which are decided on principles of justice and equity grounded on the exigencies of family necessities or benefit. A widow in the family finds herself compelled to marry her daughter and to perform certain necessary post-nuptial

Joint-family necessities and disputing co-parteners.

1. *Bhana vs. Chindhu*, 21 Bom., 616.

2. *Guruvayya vs. Dattatraya*, 28 Bom., 11.

3. *Danlap Ram vs. Mehar Chand*, 15 Cal., 570, P. C.; *Krishna vs. Shambu*, 26 Mad., 28.

ceremonies such as *griha-prabesh* and *ritu-shanti*. These ceremonies, particularly of families of higher castes, thread ceremony of Brahmin families and acts of necessary improvements of properties belonging to the joint estate, give rise to controversies which do not unfrequently come up for decision by our Courts of law. The decisions quoted below are in support of the view that for such necessary acts of legal and family necessities, the joint estate is liable.<sup>1</sup>

In the foregoing Chapter as well as in this I had occasions to state in more places than one that under the prevailing view of the law in the decisions of Courts, with the support of judgments of the Privy Council, the mortgage of joint or ancestral estate by father or by the managing member of a joint Hindu family is redeemable once, and only once, when the mortgagee brings his action against the mortgagor provided the mortgage is for valid and necessary purpose of the family. An attempt to redeem the mortgage again on the sole ground that the plaintiff, a son or a junior coparcener, was not made a party in the previous mortgage suit is considered utterly useless, if the proceedings of the previous action show that it was a representative suit and that behind the back of the mortgagor the sons and the other members substantially figured, as parties. Otherwise the suit to redeem the mortgage after the termination of the sale or foreclosure proceedings previously held, can be successfully defeated by showing that the debt of mortgage which was executed by the father or the manager was for legal necessity. The rulings show that in this respect there is no difference between the father and the manager (elder brother or the like) executing the necessary mortgage pledging joint property of the family. The aforesaid point is amply borne out by two well considered decisions of the High Courts of Bombay and Calcutta.<sup>2</sup> But at the same time it

1. *Vaikuntam vs. Kallipiram*, 23 Mad., 512; *Vaikuntam vs. Kallipiram*, 26 Mad., 497; *Madan Mohan vs. Rajab Ali*, 28 Cal., 223.

2. *Baldeo vs. Mobarak*, 29 Cal., 583, *Sakharam vs. Devji*, 23 Bom., 374; see also *Daulat Ram vs. Mehr Chand*, 15 Cal., 70, P.C.

must also be conceded that where a party with vested interest in property seeks to redeem a mortgage exhausted by a previous litigation in which he was not impleaded, decree for redemption cannot but be passed if the execution purchaser, by sale or by fore-closure, waiving the benefit of the previous action and the acquisition of estate by the execution proceedings, does not set up the legal necessity of the debt for which the mortgage had been executed. It would, I fear, be no part of the business of the Court to set up questions of fact, such as the representative nature of the previous suit and the binding nature of the debt therein involved. These are not self-evident points of law that would arise against the second legal chance for redeeming the estate: and this chance appears to have been readily accorded to the plaintiffs in 2 N. L. R., 116 and 4 N. L. R., 168. The facts of these two Nagpur decisions, commented on previously, do not show that the learned lawyers on the defendants' sides made it a point of their defences that the sons and the other members of the family were bound by the decrees in-as-much as the original mortgages were debts of legal necessity. It would at the same time appear that in all probability this point was overruled and the Courts were influenced under the mistaken view of the law that the plaintiffs had an unimpeachable right to redeem mortgages which were extinguished and merged in foreclosure.

The touchstone in such cases is legal necessity. In a Calcutta case<sup>1</sup> the mortgage was by a subordinate and a junior member of the family. That such member had implied authority from the elders to deal with the property and to repay the family debts was amply borne out by evidence. Under ordinary circumstances the several members in the household are in management of several kinds of business and of estates. An implied consent of accredited agencies for the benefit of the family and of the world outside can, I think, be fairly presumed. In the Calcutta case cited above the mortgage by the junior members, being supported by legal necessity, was held to be binding.

Junior or senior member as manager to mortgage etc. for legal necessity.

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2. *Mudit Narayan vs. Ranglal*, 29 Cal., 797.

But in cases where a conflict arises among the members regarding the right to manage the coparcenary estate or of any part of it, it is a principle of sound equity and justice that the senior member for the time being should be granted the charge of management. The recent Madras decision<sup>1</sup> is a case in point. The ruling should not be construed to relate merely to trust and charity properties. Because the learned Judges have followed the decisions of Courts and observed that the rule of the senior's prerogative for management, in the absence of any contract or agreement to the contrary, is applicable to all sorts of joint estates. The trading or the banking business of a joint family may be in the charge of the uncle or a younger brother. The deposit money held in trust by the manager may be secured by the pledge of family property. It has been held that such a pledge or mortgage is binding on the estate;<sup>2</sup> and that the other coparceners were not entitled to claim their shares free from the encumbrance. The learned Judges of Calcutta have

Non-mortgaging coparceners' right to redeem, mortgage of legal necessity.

relied on a decision of the Privy Council<sup>3</sup> which was on a suit on a mortgage debt in which the mortgagee brought his action, not against the whole joint family, but against the two members of the family who were managers of it and who had executed the mortgage. In this case their Lordships say:— "It appears from the cases that have been cited that notwithstanding the fact that the defendants were not made parties in the suit, still as the suit was brought upon the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all the parties or only the right, title and interest of the two parties who were made defendants."

In cases of mortgage like the above, the question sometimes arises whether the non-mortgaging coparcener can sue to redeem the mortgage after the termination of the foreclosure or of the sale proceedings. This point has been fully discussed in the foregoing

1. *Thandavaroya v. Shunmugam*, 32 Mad., 167.

2. *Sheopershad v. Saheblal*, 20 Cal., 453.

3. *Daulat v. Mehr Chand*, 15 Cal., 70, P. C.

Chapter in relation to mortgage executed by the father. It has been pointed out that when such a mortgage imposes a valid obligation on the son and the mortgage is finally determined by foreclosure or by sale, the son cannot, merely because he was not made a party, seek to redeem the mortgage. The same remarks would, I apprehend, apply to mortgages executed by the managing coparceners. The Full Bench decision of Allahabad<sup>1</sup> after overruling an earlier decision of the same High Court<sup>2</sup> and following the precedents of other High Courts noted in the case, has laid it down as a condition for recovering the vested interest of a sharer that he should claim his interest on the ground of want of legal necessity. Redemption of the whole estate was not allowed, though that was the ground of suit for the sole reason that the plaintiff had a vested interest in the property that was mortgaged and that he was not made a party in the mortgage suit although the mortgagee had notice of his existence. The mortgage in the Full Bench case cited above had determined by sale absolute in favour of a third party. The claim for redemption was dismissed by the High Court. A somewhat fanciful distinction has been made by the Allahabad High Court in a recent decision<sup>3</sup> between foreclosure and sale brought about on a mortgage of necessary and binding debt on the family. Foreclosure is sale absolute in favour of the mortgagee himself; while the auction sale may be in his favour or in favour of a third party. The principle respecting the loss of equity of redemption is equally applicable to both the classes of cases. A representative mortgage action wherein the mortgagor appears and acts must finally determine the mortgage with its equity of redemption. The ruling last cited quotes isolated phrases and stray thoughts from the decisions of the learned Judges in the Allahabad Full Bench Case to justify the claim for redemption. With due deference, therefore, to the view adopted, I apprehend, it can very fairly be contended that no claim for redemption would lie but that the only remedy of the coparcener would be to seek to recover his share by showing that the family was not benefited by the mortgage.

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1. *Debi Singh v. Jia Ram*, 25 All., 214.

2. *Kaunsilla v. Chander*, 22 All., 377, F. B.

3. *Ram Prasad v. Man Mohan*, 30 All., 256.

The equitable provisions of procedure embodied in the first schedule of the Civil Procedure Code of 1908 have hardly any strict application against the managing coparcener of a united Hindu family. I would, for instance, refer to O. 32 R. 6 and O. 21, R. 15. These correspond to ss. 461 and 231 of the Code of 1882. In a case<sup>1</sup> decided by the High Court of Calcutta the point for consideration was whether the managing coparcener was subject to any equitable restriction for withdrawing the deposit amount credited in his and a minor coparcener's favour in execution of a decree in a suit in which the minor was represented by the manager as his next friend. The same equitable considerations would naturally arise at the time of the execution of the decree. It can hardly be denied that the execution of decree and the withdrawal of the deposit amount from Court are necessary acts for the minor's benefit. The High Court ruled that no security for the ulterior benefit of the minor was demandable from the managing coparceners. It was so held, presumably because the manager, *ipso facto*, under the principles of Hindu Law, represented the family including the interests of all the members, adult or minor. This principle, I think, subordinates the provisions of the adjective law of procedure which relates, for instance, to the array of parties and other equitable considerations. The only essential ingredient in such cases is to see that the manager had the actual and *bona fide* character in the suit or in the proceedings. The learned Judges of Calcutta referred, in support of their view, to an important decision of the Privy Council<sup>2</sup> in which it has been ruled that a certificate of guardianship cannot be obtained in favour of a minor coparcener and that such certificate does not necessarily impart legal representative character to the certificate-holder so as to prejudice or to affect the manager's powers to mortgage the entire interest of the family property for legal necessities. It was a point of contention in the case that the certificate-holder did not obtain the necessary permission of the Court for the mortgage transaction. But as the certificate itself was needless,

Manager, *ipso facto*,  
representative of the  
family for necessary  
acts

1. Harihar v. Mathuralal, 35 Cal., 561.
2. Ghorib-ullah v. Khalak Singh, 25 All., 497.



the contention was not allowed to prevail against the validity of the transaction on its merits.

It is a point of general importance to remember that property may be acquired by a coparcener, be he a father or any other

Obstructed and unobstructed heritage, coparcener's interest, alienation, legal necessity.

member in the family, the alienation of which by the said member to a stranger is not subject to the restrictions of legal necessity. In

a recent decision<sup>1</sup> of the Privy Council, the father of a united family in the Punjab acquired an estate as a reversioner of a distant collateral relation of his. The widow of the said relation had made a gift of her husband's estate which the father had successfully sued to set aside as not affecting his reversionary interest. In due course of time upon the widow's death the heritage fell into his possession. It was alleged that the father sold the estate for no legal necessity, that he was addicted to drink and that the sale was a reckless waste. The sole question before their Lordships was whether the heritage acquired by the father after the widow's death was, so far as the plaintiffs (sons) were concerned, ancestral property in his hands, or whether it was his self-acquired estate which he was competent to alienate at his pleasure. The Privy Council, differing from the view of the Chief Court of the Punjab, held that the estate was the father's self-acquired property. In that view of the matter the plaintiff's claim was dismissed with cost. This is an instance of what Mr. Mayne calls a *Sapratibandha* or obstructed heritage, (Seventh Edition, p. 274.) This decision so far is sound law. But I fail to understand, with all humility to the view of the matter expressed by Lord Collins in the decision of the Board, how the question depended on the nature *i.e.* ancestral or otherwise of the estate of the late owner for deciding whether the father as reversioner got the estate as self-acquired or ancestral property in his hands. Their Lordships say : "It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in the like manner claimed, they are not deemed ancestral in Hindu law.

1. *Atar Singh v. Thakar Singh*, 35 Cal., 1039.

Therefore, if the plaintiffs cannot show that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails."

The extract quoted above from the decision of the Privy Council contains an *obiter* which it is very necessary to notice. It would

Coparcener reversioner's interest, self-acquisition, *obiter* of Privy Council.

appear as if the plaintiffs would have succeeded if they had established that the property was Dhanna Singh's ancestral. Such an *obiter* in the decision of the Privy Council naturally carries great weight. It is looked upon in the light of an authoritative decision governing Courts in British India. But in deference to this view it is necessary to point out that a distant reversioner or a coparcenary member has no kind of interest in the property which devolves on the immediate reversioner. Take, for instance, the case of a father who gets the estate of his divided brother upon the death of the latter's widow. It matters not in the least whether the estate of the said divided brother was self-acquired or ancestral. The father as the next heir could, by his consent, validate an alienation by his brother's widow in favour of a stranger. Take again the case of two stepbrothers, one of whom inherits the estate of his maternal grandfather upon the death of the latter's widow. Surely the sons of the father in the former case and the stepbrother in the latter have no right to compel the recipients of the derived inheritances of reversionership to bring the devolved properties into the hotch-pot for partition. It is thus clear that such an estate is alienable by the reversioner at his pleasure and without any regard for the family need or the legal necessity for alienation.

The conflict of views which prevailed for a series of years among the High Courts of India is gradually assuming the form and nature of a sharp division between the High Courts of Bombay and Calcutta on one hand and those of Madras and Allahabad on the other. It may be true that in point of principle there is absolute unanimity throughout the country. The principle is this: A debt of legal necessity or of family need incurred by the father or by the manager of a joint Hindu family is recoverable from the estate. The difference of opinion begins from the moment that the debtor or the judgment-debtor dies. The said difference

no doubt relates to the procedure to be followed by the creditor to recover his money. Should he continue the execution of his decree or should he institute a new suit founded on the decree? The question so put is simple and elementary to the ear. But it is of great moment and importance in practice. The difference between the costs and trouble in execution proceedings and those that are required for new civil suits is well known. Of course barring this difference all the rest, namely, issues, pleadings, and the evidence are identical in the execution department as well as in the proceedings of the suits. The standing decision of the

High Court of Bombay reported in Vol. XX of the Indian Law Reports which has been repeatedly quoted in Chapters VII and VIII of this book has been followed by the same High Court in a very recent case.<sup>1</sup> It has been ruled that a money decree obtained against the father of an undivided Hindu Mitakshara family, can be executed after his death against his son to the extent of the ancestral property that has come to his hands, even if the debt has been incurred for the sole purpose of the father provided it is not tainted with immorality or illegality, and the son can take objections that the debts are tainted with immorality under section 47 of Act V of 1908. It has been further ruled that there is no substantial distinction in regard to questions arising in execution between the position of legal representatives added as parties to the suit before the decree, and legal representatives after the decree. All questions between them and the decree-holder relating to execution must alike be disposed of under S. 47 of the Civil Procedure Code; the order in execution being appealable in the same way as a decree passed in an original suit. The course of decisions in Calcutta within the last five or six years indicates a gradual approach of the Calcutta view for assimilation with the view prevailing in Bombay. The Referring Order in the decision of the Calcutta Full Bench Case<sup>2</sup> contains a classified list of the divergent views of the High Courts of India including those of

Sons and coparceners,  
legal representatives,  
execution of decree.

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1. *Shivram vs. Sakharam* 33 Bom., 39.

2. *Amar vs. Sebak*, 34 Cal., 642, F. B.

the Calcutta High Court itself. After considering all those rulings the majority of the Bench came to the conclusion that on a construction of sections 50 and 47 of Act V of 1908 the liability of the ancestral property or of a share of it for the debt covered by the decree might be determined in the execution proceedings, if the legal representative had been properly brought on the record under section 50 of the Code. In this respect I see no difference in the case between the father and the son, and in the case between the manager of the joint family property and his coparceners; because the Mitakshara theory of devolution of estate by survivorship has been interpreted in two different ways by the Calcutta and Bombay High Courts in one way and by the High Courts of Madras and Allahabad in another.

The course of decisions in the Central Provinces of India presents a somewhat peculiar reading. Only two decisions<sup>1</sup> of the Court of the Judicial Commissioner at Nagpur have come to my notice. Both these decisions are by Mr. Stanley Ismay.

The first case arose out of a controversy between the decree-holder and the surviving coparceners in reference to the execution of a decree, that was passed against a deceased manager of the family, who was the eldest brother of the judgment-debtors, who were impleaded as the deceased's legal representatives in the course of the execution of the decree. The decision was passed in the year 1900. The learned Judge after reviewing most of the authorities on the subject, that were brought to his notice, came to the conclusion, that it is in the power of the decree-holder, to rely on the proceedings in the suit to deduce an inference, that the original action and the decree passed therein, bore the stamp of representative character, in order to justify his impleading the sons or the coparceners, as the case may be, as the legal representatives of the deceased judgment-debtor. It is, however, not explained, what is the criterion or index to draw such an inference from the records of the previous suit. Is the father sued, as the father of so and so, sons, or the brother as the manager of

1. *Kesheo v. Jawahir*, 16 C. P. L. R., 19; *Gopal Rao v. Berar Company*, 1 N. L. R., 173.

the other brothers described in the plaint? In some cases no doubt, the defendant is described as the owner and manager—*malik* and *aihatdar* of the firm so and so. In other cases, it must be left to the whim or caprice of the Judge to draw his own inference in the matter. Strange enough, the same learned Judge, in a more recent case noted above, came to a contrary decision in an execution matter, in which the deceased judgment-debtor's son was impleaded as a legal representative. The later decision was justified on the ground, that the father was not sued in his representative capacity. I may say at once that, in view of the existing conflicts on the subject, the later decision is consistent with the better opinion that prevails in the country.<sup>1</sup> It remains only to add that an enquiry in the Execution Court is bound to be looked upon, more as summary, than as procedure, in a regular civil suit which may be filed on the basis of the infructuous decree. There can be no doubt that the defendants in the civil suit will have ampler scope for their pleadings and evidence, including perhaps the contention that as a matter of fact there was no foundation for the claim or liability upon which the original decree could have been passed. If the Bombay decision and the recent Calcutta Full Bench case, noticed above, were accepted, the executing Court, I am afraid, will not permit the judgment-debtor to go behind the decree though other contentions as regards its binding nature on the ground of immorality or want of legal necessity, may be entertained and tried.

1 See Sec. 53, Act V of 1908.

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## CHAPTER IX.



### Guardians and Minors and other Fiduciary Relations.

In this Chapter I have endeavoured to consider the effect of dealings on behalf of minors and other incapable persons. The discussions in this Chapter will contain in greater detail notices of rulings, compared up to a recent date, of the variety of circumstances and conditions under which the estates of the aforesaid persons have or have not been held to be liable. The Indian legislation contains principles of law on the various subjects to be discussed in this Chapter. These statutory principles are always in the abstract. The illustrations sometimes given under the sections of law, and the precedents of Courts are all concrete and suggestive matters, and are for this reason really necessary and useful for the profession of law, and for the administration of justice. The Bar and the Bench would be equally interested to notice the gradual development of ideas brought about by the conflicts of case law with the progressive legislation on the several subjects which I have tried to include in this Chapter. The old rulings no doubt stand ; but the later rulings distinguishing or dissenting from them have been noticed side by side for concentrating the attention of the reader.

It may be noted, as a principle of general law, that a minor or other incapable person is unable to contract or to delegate authority to do so. A question has been very frequently asked and variously answered, as to whether if a necessary debt is contracted by a minor, or if a necessary contract is made by him, the said obligation or contract is void *ab initio*. Conversely it is a question how far a contract or an obligation created by or on behalf of a minor or an incapable person can be legally enforced against him or his estate. When a matter of this sort comes before the Court the rules of the Procedure Code demand that the minor or other incapable person must be fitly and properly represented as a party. The test of the minor's liability

in such cases, generally speaking, is the benefit to him personally or to his estate. To take the case, first, of an obligation created in favour of a minor. An early important case<sup>1</sup> on the subject is a decision by Garth, C. J. It was a suit based upon a bond executed in favour of a minor. On a reference by the judge of the S. C. C. to the High Court, the learned Chief Justice, after reviewing an early decision of Bengal, and referring to English cases reported in Addison on Contracts, held that the contention of the defendant that the bond was absolutely void, and could not be made the basis of a suit, was erroneous. A decree was accordingly passed in favour of the obligee. There has,

Minor as obligee for valid debt. since then, been a strong following of this decision in numerous cases in the same High

Court<sup>2</sup> and in the High Court of Bombay. The latest case on the subject is a decision of Allahabad<sup>3</sup> passed in 1908. That was a case on a mortgage executed in favour of a minor. It was for a debt advanced to the mortgagor by a joint Hindu family. For reasons not stated in the Report, the joint family took the bond in the name of a minor member. In the opinion of the learned Judges of Allahabad there was no room for the contention that the contract of mortgage was void on the score of the mortgagee's minority; because, the said contract was not by the minor. It was further held to be a mortgage executed by an adult in favour of the joint family, and the minor was set up by that family as the *nom-de-plume*. Reference was made to the decision of the Privy Council<sup>4</sup> which has now settled the point that the contract by a minor is not merely voidable, but that it is void *ab initio*. The Allahabad Court distinguished the case before them as converse to the case decided by the Privy Council. I will here remark that the *ratio decidendi* in the early Calcutta case noticed above is not precisely what the recent Allahabad case has followed, though in both the cases the minor sued as the obligee of the contract. The view of Garth, C. J. in the ruling reported at I. L. R. 11 Cal., 552 to the effect that the minor's suit is maintainable on the ground that the contract is voidable at his (minor's)

1. Sashi v. Jadu, 11 Cal., 552.

2. Mahomed v. Saraswati, 18 Cal., 259.

3. Meghan v. Pran, 30 All., 63.

4. Mohori v. Dharmadas, 30 Cal., 539, P. C.

option and is thus enforceable, cannot, in view of the Privy Council decision noticed above, be supported. The real reason for decree in favour of a minor is that the contracting party sought to be rendered liable is not a minor and therefore the question of minority does not arise.

There is however much conflict of views on the question as to whether a contract in which a minor is concerned, cannot be enforced. The conflict relates (1) to executory contracts, and (2) to executed contracts. Regarding the former the decision<sup>1</sup> of Norris, J. has been considered in the later decisions of Calcutta and Madras to be an abstract and technical reading of the law as embodied in the Indian Contract Act of 1872. Indeed the later<sup>2</sup> decisions have expressly dissented from the view of Norris, J. in I. L. R. 20 Cal., 508. It is said that a

Full Bench decision of the Calcutta High Court  
 Contract for minor.  
 specific performance. has followed with approval the views of Norris, J.

But on close observation it would be seen that the Full Bench case<sup>3</sup> noted below is after all only a reference to the Full Bench by Woodroffe, J. wherein that learned Judge made it a point in the reference order whether the decision of Norris, J. quoted above had been rightly decided. With the exception of Maclean, C. J. the other learned Judges of the High Court refrained from passing any opinion on the subject, while Rampini, J. considered the decision of Norris, J. to be erroneous. The remarks of Rampini, J. are "But it appears to me that the learned Judge who decided the case of *Fatima v. Debnath* (I. L. R. 20 Cal., 508) proceeded on a misapprehension of facts. He says this is a case of specific performance of a contract and the case of *Flight v. Bolland* (4 Russ. 298) is applicable. But in that case, the contract was entered into by the minor himself, whereas in *Fatima v. Debnath* the contract had been entered into by the father of the minor; and therefore in my opinion the rule laid down in the case of *Flight v. Bolland*, did not apply to the facts of that case." Thus it appears to be a settled point that cases of contracts or agreements entered into by competent persons for or in the interests of

1. *Fatima v. Debnath*, 20 Cal., 508.

2. *Kharunnessa Bibi v. Loke Nath*, 27 Cal., 276; *Krishnasami v. Sundarappayyar*, 18 Mad., 415; *Shripat v. Kashiba*, 19 Bom., 697

3. *Mir Sarwarjan v. Fakaruddin*, 11 C. W. N., 34.



minors can be specifically enforced by or against them. This is the conclusion that can be fairly deduced from the aforesaid authorities, read as a whole. It would not be repugnant to the decision of the Privy Council quoted in the foregoing paragraph if in the framing of the suit the name of the minor figures as the sole plaintiff or as a co-plaintiff represented by his next friend or if he is arrayed as a defendant or as a co-defendant. If then in a case of this sort a contract of an executory nature can be given effect to, it would follow on *à fortiori* reasons that an executed contract in which a minor is interested cannot be defeated for the sole reason that the minor's name appears in the contract. The bare mention of the minor's name in the body of the contract or of the agreement is *ipso facto* no ground to decline specific performance for or against the minor's estate. We have it in Trevelyan's work on Minority, page 179, sufficient authority for saying that a decree for specific performance of contract can be given against a minor when it is for his benefit.

Thus then, we have two classes of contracts the legal effects of which we have to discuss in this Chapter. A contract by a competent person on behalf of the minor presents ordinarily no difficulty. But difficulties and complications only arise in cases of contracts entered into by the minors themselves. We have got the fixed land-mark of law regarding the validity, or otherwise, of contracts by minors, insane persons and other classes of persons of legal disabilities. We have the express provisions of law in the Contract Act of 1872 which lay down that such contracts are bad in law. A final stamp of such contracts being absolutely void has now been fixed by the decision of the P. C. quoted in a foregoing paragraph. But it will be seen that the divergent views on the subject are due to the reasoning of Courts which held such contracts to be voidable at discretion. By holding in this manner, the Courts travelled beyond the precincts of definite and well-expressed legal provision and entered into the regions of equity wherein only a few provisions of legislative enactments exist in this country. It is not a matter for wonder that in the broad field of equity considerations the lines of decisions of cases have not been uniform, and results not compatible with each other have been arrived at. We will illustrate this by

Contracts by minors,  
void, not voidable.

quoting a Calcutta case,<sup>1</sup> which has received a sort of approval in a subsequent Madras<sup>2</sup> decision. In the Calcutta case the registered bond was executed by the minor himself, the consideration being advances to the minor for his defence in a criminal case. The plaintiff's claim was decreed for the sole reason that the advances were for the minor's benefit and that he was liable to repay the loan. But it is difficult to understand how such a bond could be made the basis of a suit. The advances were made admittedly to a minor six years prior to the action, and it was further admitted that the defendant was also a minor at the time of the suit. To decree a claim of this sort is, I apprehend, an open defiance to the provisions against the validity of such contracts embodied in the Contract Act. It is perhaps intelligible if the suit had been based on the specific advances as the cause of action. But the learned Judges of Calcutta considered the bond to afford the ground for suit, and the registration of that bond to give to the plaintiff an extended period of limitation. There are similar cases of Courts in which the minors, representing themselves to be adults, secured loans in their favour and granted to their creditors securities by way of mortgage of land. The facts out of which the Privy Council case reported in I. L. R., 30 Cal., 539 arose, afford an instance in point. In this case

the plaintiff's suit was dismissed throughout. The main reason for the decision was the fact of the admitted minority of the borrower who was made the defendant in the action. The plea of estoppel against void instrument. The plea of estoppel against void instrument. The defence was disallowed on the ground that there was no alteration of position on the part of the plaintiff, for the reason of any misrepresentation by the minor because the plaintiff was held to have been aware of his minority at the time of the transaction. But the question is, does it necessarily follow from this decision of the Privy Council that if a creditor is really misled by a minor's false representation of his majority that he can always successfully advance the plea of estoppel against the *fact* or the *ground* of the defence of minority? In a Calcutta decision<sup>3</sup> with the current of decisions therein quoted,

1. *Shamcharan v. Chowdhry Debya*, 21 Cal., 872.

2. *Venkata v. Timmayya*, 23 Mad., 314.

3. *Sarul v. Mohan*, 25 Cal., 371.

the aforesaid question appears to have been answered in the affirmative. But in cases of fraud *separate from contract* a person under disability may estop himself to deny the truth of his representation,—See Bigelow on Contract, 602, cited in Woodroffe and Amir Ali's Evidence Act, 3rd Edition, page 996. I have italicised the above expression to lay stress on the fact that there is not much room for the equitable plea of estoppel directly against the contract which is void *ab initio*. It should be distinctly borne in mind that the avoidance of a contract in its entirety is distinguishable from the equitable reliefs provided for in sections 64, 65, 68, 69, 70 of the Indian Contract Act and sections 38 and 41 of the Specific Relief Act. The conflict of the law of estoppel with the law respecting void contracts on the subject now under discussion is very well illustrated in a recent well considered judgment of the High Court of Allahabad.<sup>1</sup> Although in that case Bannerjee, J. refrained from asserting the sweeping allegation that in no case of avoidance is the plea of estoppel a successful weapon of defence yet he gave it as his decision that the particular contract that was set up in the case could not be given effect to on the ground of estoppel, but that on equitable grounds the party defrauded by misrepresentation of age was fully entitled to be reimbursed for the benefits obtained by the fraud. In a plain case of a contract of agricultural lease by a minor, the Judicial Commissioner<sup>2</sup> at Nagpore set aside the lease and directed refund of the premium received by the minor in consideration for the lease.

I next proceed to consider the cases of equitable relief to which the creditor is entitled for the benefits conferred by him on the minors and other incapable persons under the variety of circumstances provided by law. On this subject Messrs. Woodroffe and Amir Ali in their *Law of Evidence applicable to British India*, 3rd Edition, page 995 remark as follows:—“And when an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity to restore any advantage he has obtained by such representations to the persons from whom he has obtained it” (see Pollock on Contract, 6th Edition 73-76

1. Jagannath v. Lalta Prasad, 31 All., 21

2. Mohammad v. Nago, 1. N. L. R., 185.

quoted in Woodroffe and Amir Ali, 3rd Edition, page 995). In a case<sup>1</sup> decided by the High Court of Bombay the

Surety's liability for unnecessary debt to minor &c. borrower was a minor girl under a bond in which two other persons stood as sureties

for the repayment of the debt. It was held on evidence by the Court of first Appeal that the debt was contracted by the girl to meet the expenses of a litigation which as a question of fact was not considered to be necessary. On this subject there is no discussion in the decision of the High Court; but it may be fairly presumed that the expenses did not conduce to the benefit of the minors' estate. A fair case of this sort must, I presume, be made out by the claimant before the minor's estate can be held to be liable. Under the view that then prevailed, the bond executed by the minor was considered only as a voidable document, and the claim against the minor failed because there was no evidence of ratification on the part of the debtor after attaining majority. These points have now been rendered superfluous by the P. C. decision reported in Vol. XXX, Calcutta Series, cited already. The result, however, arrived at was the same, and the bond was held to be inoperative so far as the principal debtor was concerned. But in the opinion of the Court the sureties were not entitled to claim exoneration on the ground that the transaction was a nullity as being a contract by the minor. In the opinion of Farran, J. the suretyship of the other defendants was not considered as a collateral contract but it was looked upon as an independent contract apart from the question that the bond was not enforceable against the debtor. We find this view to a considerable extent supported in a recent decision<sup>2</sup> of the Special Bench of the Calcutta High Court wherein the majority of Judges saddled the liability on the sureties under circumstances similar to, if not identical with, the Bombay decision cited above.

I now proceed to consider the subject of guardians and minors as regulated by the Indian Legislature from time to time. To explain the law on the subject it is not necessary to go earlier than the year 1858, when Act XL of 1858 was passed. Local and Provin-

1. *Kashiba v. Shripat*, 19 Bom. 697.

2. *Debendra v. Administrator General of Bengal*, 33 Cal., 713 (Sp. Bench).

Act XL of 1858. cial Acts and Regulations, mostly subsequent to that year, and inserted in the Schedule appended to the present consolidated law on the subject (Act VIII of 1890,—See sec. 2), were in force for a series of years in various parts of the country. They have all been repealed by the Guardians and Wards Act of 1890. A detailed consideration of the several enactments is not necessary.

Act VIII of 1890. But I will quote some of the provisions of those Acts which have been exhaustively considered by the Courts of law, and which represent, with tolerable accuracy, the corresponding legal provisions that were in force in the other parts of the country. Finally, I will quote, for facility of reference, from the present consolidating and amending Act of 1890. These provisions of law are given below :—

Sec. 18, Act XL of 1858 :—“ Every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor.

“ But no such person shall have power to sell or mortgage any unmoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.”

An uncertificated guardian was never hampered by the aforesaid legal restrictions. He had no necessity to wait for the Court's sanction or order to enable him to deal with his ward's estate. His dealings, before they were valid, were of course subject to the security of justice, fairness, necessity and benefit, just as much

as those of a certificated guardian were. In this respect, there was no difference of any

kind between these two classes of guardians, certificated and uncertificated. Only the sanction implied a *prima facie* guarantee that the transaction was good. No sanction presumably could be accorded unless the legal necessity for the particular transaction was established to the satisfaction of the Court. But this was only a rebuttable presumption. Conversely, if

a guardian, holding the requisite certificate, and therefore subject to the jurisdiction of the Court as regards his power of dealing with the minor's estate, omitted to take the sanction and entered into a transaction distinctly beneficial to the minor, want of certificate did not stand in the way of the equities being rendered to the parties. It has been held by the Allahabad High Court,<sup>1</sup> under Act XL of 1858, that the transaction of mortgage of the minor's estate by the guardian, holder of a certificate, in contravention of the law was not void *ab initio* or illegal, but that the omission to obtain the sanction relegated the parties to the position as if no certificate had been obtained. It would make this difference, however. The transaction would not be enforceable; it would be regarded as if an unauthorized person had intermeddled with the estate. The learned Judges of the Allahabad Court distinguished and referred to some early decisions<sup>2</sup> on the subject, and remarked that the view that the contract is void *ab initio*, expressed in some of the cases, has been pushed too far. To the list of rulings considered in this judgment may be added another<sup>4</sup> of the same High Court, which too held such a contract to be void *in toto*. The

Unsanctioned alienation unsustainable even with legal necessity, equitable restitution

Allahabad Court, by its ruling in the ninth volume did not disagree so much with the view of law stated in the earlier rulings; it only differed in the mode of expression, and the treatment of the case. Because there can be no doubt that if a contract is made in direct contravention of the mandate in sec. 18 of the old Act, it must be, so long as that law was in force, held to be void—(*vide* sec. 23 of the Contract Act). In I. L. R., 3 All., 852, the learned Judges went the length of laying down that such a contract could not be validated by ratification by the minor; that is to say, it was not voidable at his option. The hardship of this began gradually to be felt, and the difficulty continued, till the law was consolidated in 1890 by the present Guardians and Wards

1. Girraj v. Kazi Hamid, 9 All., 340.

2. Lalla Hurro Prosad v. Basaruth Ali, 25 Cal., 909 Nizam v. Anandi, 18 All., 373.

3. Munji Ram v. Zara Singh, 3 All., 852. Shurrut v. Raj Kissen, 15 B. L. R., 350. Hamir v. Takia, 1 All., 57.

4. Chimman v. Subra Koer, 2 All., 902. Compare also, Lalla Hurroprasad v. Sheikh Basurath Ali, 2 C. W. N., cxc.

Act. as the section 18 of the old Act stated barely the prohibition, but laid down no law as to what would be the

consequences of its contravention, there was nothing which could possibly prevent rendition of equities by way of restitutions in equity, when the contract itself became unenforceable. Some of the

But the equities there for.

rulings<sup>1</sup> noted above stopped short after annulling the deed, but did no justice to the pleas of legal necessity and benefit to the minor raised by the other contracting parties.

In the Calcutta case cited above, reported in Vol. XXV, the plea of legal necessity which was raised by the mortgagee as an alternative case to justify his claim for the refund of money, was summarily overruled by the learned Judges on the ground that by the current of rulings prevailing in the High Court of Calcutta, an unauthorised transfer by the certificated guardian was held to be a nullity *ab initio*. On this ground the High Court reversed the remand order of the District Judge which was based on the alternative case for refund for equitable restitution that was set up by the plaintiff. That this view of the matter is not in strict conformity with justice and equity is abundantly borne out by a series of rulings of High Courts beginning with I. L. R. 9 All, 340.<sup>2</sup> It is true that some of the later decisions quoted below were governed by Act VIII of 1890; but it is impossible to follow the Calcutta decision cited above, even in reference to the provisions of the earlier Act XL of 1858 in view of the contemporary rulings of other High Courts which were not in favor of summary avoidance of the contracts of uncertificated guardians without equitable restitution of advantages derived from those contracts.

Previous to the passing of this Act, it has been repeatedly laid down that under section 18 of Act XL of 1858, the Civil Court had not only the power, but was also bound to enquire into and to determine the question, whether the proposed mode of dealing with the minor's estate would, if sanctioned, be for the benefit of such infant; and that the petition should contain all the materials reasonably

Enquiry into legal necessity by the Judge.

1. Lala Hurroprasad v. Basaruttali, 25 Cal., 909.  
2. Nizam v. Anandi, 18 All., 373. Tejpal v. Ganga, 25 All., 59. Harendra v. Moran, 15 Cal., 40. Sinaya v. Munisami, 22 Mad., 289. Abdul v. Sulphdayal, 28 All., 30, per Bannerjee, J., 32.

required to enable the Court to decide the question.<sup>1</sup> This decision followed an earlier case reported in the fifth volume.<sup>2</sup> The last decision went further and stated that after the judicial mind of the Court had been exercised in favour of the proposed alienation, strong presumption in favour of the legal necessity therefor and benefit to the minor would arise. The Court (Garth, C. J.) pointed out the distinction that whereas previous to the passing of the Act in 1858,—and for that matter, subsequent to the passing thereof in cases where no certificate of guardianship is taken out,—on a suit being brought by a minor on coming of age, to recover property sold by his guardian during his minority, it was generally incumbent upon the purchaser to prove that he acted in good faith, that he made proper enquiries as to the necessity for the sale, and that he had honestly satisfied himself of the existence of that necessity. The purchaser, dealing with a certificated guardian and acting on the basis of the Court's permission, is not bound to make the same enquiry which the Judge has made, and to determine for himself whether the Judge has done his duty properly and come to a right conclusion. The result is, that in the latter case, the *onus*

*Onus* in cases of sanction by the Judge.

is shifted from the purchaser to the party impeaching the transaction. It has also been held in that case that where the purchaser is himself the creditor, and, therefore has the means of satisfying the Court as to the origin and the nature of the debts, and how they were binding on the minor, the burden of proof is shifted on the purchaser, when the plaintiff has established a *prima facie* case.

A recital in the deed of the legal necessity is ordinarily no evidence *per se*. The above case treated such recital as evidence of some sort. But there can be no doubt that such a recital puts the purchaser on his guard, and is a fair index of his *bona fide*, and that its absence will make it more difficult for the party, on whom the burden of proof lies, to establish the existence of a legal necessity.

1. *In re Shrish Chunder*, 6 Cal., 161.

2. *In re Sikhar Chund v. Dulputty*, 5 Cal., 36.



The Court would refuse to enforce a contract specifically, even if the same were sanctioned by the Judge, if the sanction of Judge is subordinated to legal necessity. at the time of the action, legal necessity of the transaction or the benefit to the minor is not clearly established. The presumption of benefit which arises from the granting of the sanction is rebuttable. If, for instance, in spite of the previous sanction, the guardian, with like sanction, bargains with a third party, in consideration of a better advantage or benefit to the minor, specific enforcement of the previous contract cannot be enforced and the subsequent arrangement displaced. It would clearly make no difference in principle if there be no such subsequent arrangement as in the Calcutta case just noticed. If the presumptive legal necessity which the Judge's sanction implies is rebutted in the case, the Court will not force the contract on the minor.

Before proceeding further, it is necessary to observe that the Mahomedan Law is governed by different principles. It would appear as if none except the "near" guardians can alienate the minor's property.<sup>3</sup> An alienation of the minor's property by any person other than his natural or properly constituted guardian is liable to be repudiated by the minor after majority or even before. But whether this could be done without recouping the alienee to the extent of the advantage or benefit derived from the transaction deserves careful consideration. It is one thing to uphold the transaction in its entirety, and quite another and different matter to compensate for the benefit and the legal necessity of the dealing. The views of Courts and of the text writers on this subject are not quite uniform. Mr. Justice Amir Ali observes<sup>3</sup> :—

"In the case of *Abbasi Begum v. Rajroop Koer*, 1. L. R., 4 Cal., 33, it was decided by Ainslie and Macdonnell, JJ., that a guardian *defacto* who has not taken out a certificate under the Act, has no larger powers than a guardian *de jure* duly appointed under it. In

1. *Jugal Kishore v. Anunda*, 22 Cal., 545.

2. *Mustt Bukshun v. Mustt Maldai*, 3 B. L. R. A. C. 423; *Mustt Bukshun v. Mustt Doolhin*, 12 W. R. 337; *Hamirsingh v. Mustt Fakia*, 1 All., 57.

3. *Personal Law of the Mahomedans* (1880), page 424.

a late case, however, a Full Bench of the Court has held a contrary view.<sup>1</sup> It has decided that it is only when a guardian takes out a certificate that his or her power becomes circumscribed within the limits imposed by sec. 18 of Act XL of 1858. The position and powers, therefore, of a Mahomedan guardian, testamentary or natural, who does not take out a certificate will be judged by the principles of the Mahomedan Law. But as has already been amply shown, the Mussalman law is extremely solicitous for the interests of minors."

Under the aforesaid doctrine, and in view of strict Mahomedan law, *de jure* guardianship is the chief criterion for the absolute validity of the alienation by sale or mortgage. Macnaghten in Chapter VIII, paras 4 and 5, has defined who are guardians. They are (1) natural and (2) testamentary: The former are "near"<sup>2</sup> and "remote."<sup>3</sup> The law goes on to describe the powers of both the classes (near and remote) of guardians. Then in paras 14 and 15, the rights to sell, mortgage, &c, have been defined. Para 6 lays down that the powers of near guardians do not vest in the remote guardians, but devolve ultimately on the ruling power. Hence it follows that the certificated guardian acting with the sanction of the Court, which was as prescribed by the old and has again been enjoined in the present Act, has the same privilege as an uncertificated "near" guardian in relation to the exercise of powers of sale, mortgage, or otherwise, that may be necessary; because a certificated "remote" guardian acting with the sanction of the ruling power stands in the same position as an uncertificated "near guardian."<sup>4</sup> There the sale was for the prescribed legal necessities laid down in the text,—(1) maintenance of the minor, and (2) payments of the debts of the late incumbent. The limited meaning of legal necessity, under the Mahomedan law, is also illustrated in *Musitt Syedum v. Syud Velayta*, 17 W. R., 238. But in that case, the sale of the moveable property (a

1. Refers obviously to *Ramchander v. Brijanath*, 4 Cal., 929, F. B

2. Fathers and paternal grand-fathers and their executors and the executors of such executors.

3. More distant paternal kindred,

4. *Husein v. Zia-ul-nessa*, 6 Bom, 467.

moiety of a decree) was upheld, though the sale was by a mother. The sale was held to have been for the minor's benefit, which a *de jure* 'near' guardian alone can validly conclude. This ruling therefore is not reconcilable with some other decisions<sup>1</sup> on the point wherein the mother, and in the last mentioned case, with her, the elder brother, has not been considered entitled to alienate the minor's interest. If such a remote guardian acted with the permission of the Court, the act would have been valid and binding if the purpose for the alienation had fallen

Prescribed list of legal necessities under the Mahomedan Law.

within the prescribed list of legal necessities: *vide* observations of Mahmood, J., in the Allahabad case noted above. In the Allahabad case, the mortgage with possession was passed by the uncle of a Mahomedan minor. He therefore was a *de facto* not *de jure* guardian. The suit was by the mortgagee for rent on a lease executed by the uncle for the minor on foot of the possessory mortgage. An *ex parte* decree was passed, which the minor got re-opened through his mother acting as his guardian *ad litem*. The decree was set aside with the remark, that if the minor had sued to set aside the mortgage or the mortgagee had sued to enforce it, it would have been annulled subject, perhaps, to recoupment of advantages and benefit enjoyed. This equitable ground however did not arise in this case.\* Exception

Judicial Sale under the Mahomedan Law.

appears to have been made in favour of judicial sale, because, perhaps, the ruling authority is concerned in the disposal. Compare *Hamir Singh v. Mustt Lukia*, I. L. R., 1 All., 57. In *Girraj v. Kazi Hamidali*, I. L. R., 9 All., 340, already quoted, the mother's act of alienation could not be upheld on technical grounds of law, but a remand in view to find the measure of compensation was made, as there were items for which the minors had derived benefit. In *Bhutnath Dey v. Ahmed Hossein*, I. L. R., 11 Cal. 417, the minor's interest was for the same reason discharged from the mortgage executed by parties who were not *de jure* guardians. The necessity for the loan was alleged to be to pay off arrears of *patni* rent. But their Lordships held that there was no evidence to show that the said arrears could not be paid without having recourse to the mortgage.

1. *Mustt Bukshun v. Mtt. Dulhin*, 12 W. R., 337. *Sitaram v. Amir Begum*, 8 All., 324, (page 338). *Baba v. Shivuppa*, 20 Bom., 199; *Hurbai v. Hiruji*, 20 Bom., 116.

2. *Nizam-ud-din Shah v. Anandi prasad*, 18 All., 373; *vide* rulings cited.

It was accordingly stated as an *obiter* that even if the executant of the mortgage had been a 'near' guardian there was no sufficient evidence to warrant a finding of necessity in support of the mortgage. Therefore no question of compensation arose.

One Hasani Bibi held some estate in her own right and also as a guardian for her brother's son and daughter, both minors. The property in dispute was inherited by her as well as by her deceased brother who died largely encumbered in debt. To pay off these debts and also for other necessities of the minors, the guardian sold the estate. The sale was upheld though the guardian was not 'near,' because the plea of incompetency of the guardian was not taken in the Court's below where the only contention, on behalf of the claimants, was that there was no legal necessity for the sale. That having been found in the affirmative, the transaction was upheld according to the general principles of Mahomedan Law, justice, equity and good conscience.<sup>1</sup> We do not question the justice or the propriety of the decision, but we must entertain serious doubts as to its legality in view of the orthodox Mussalman law and by the light of more recent decisions. The plea as to a particular class of guardian's competency is a point of substantive law, and ought, it is apprehended, to have been entertained. The actual decision passed in the case may perhaps have been similar on equitable grounds. But that is quite a different matter.

We will continue our remarks on the peculiarities of the Mahomedan law by quoting an important decision of the Privy Council.<sup>2</sup> The alienation by sale was made by a 'near' guardian (father) also a sharer in the inheritance. The purpose for the sale, as disclosed by the evidence (in opposition to the incorrect statement in the deed), was to save the estate from danger and usurpation, and to bring about a settlement. The Subordinate Judge dismissed the suit of the minors who claimed restoration of their shares on the ground that the plaintiff's father, as their *natural* guardian could, without a certificate, sell the plaintiff's properties under "legal necessities." The Lords of the Privy Council upheld this decision after reversing the judgment of the High Court.

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1. Hassan Ali v. Mehdi Husain, 1 All., 533. Compare however *Baba v. Shivappa*, 20 Bom., 199. *Pathummabi v. Vithil*, 26 Mad., 734, and *Majidan v. Ramnarain*, 26 All., 22.

2. *Kali Dutt v. Abdul Ali*, 16 Cal., 627, P. C.

The rulings of Courts show that the actual legal necessity or benefit to the minor is a distinct and independent matter. The Court's sanction may afford *prima facie* evidence only; but it is rebuttable by actual facts which, really determine the nature of the transaction and afford the safest guide for the Courts' decision.

In a Privy Council case<sup>1</sup> the certificated guardian obtained the Court's sanction for a necessary debt, but the interest at which the loan could be incurred was not specified in the sanctioning order; the Privy Council affirmed the decision of the High Court which modified the rate from 18 p. c. to 12 p. c. This was done for the benefit of the minor for whose interest the loan was contracted. The contracted rate was by no means high or penal; but the evidence adduced on behalf of the minor showed that a loan on more favourable terms could have been obtained under a more prudent management of the minor's estate.

In cases of compromise effected with the sanction of the Court, in which the minor is a party and his interests are involved, the compromise effected would not be final and conclusive on the minor, unless all the material facts for a rational decision in the matter were before the Court.<sup>2</sup> Ordinarily speaking, the sanctioning order should explicitly indicate in express terms a full and rational appreciation of all the facts connected with the case showing that the compromise was for the minor's benefit.<sup>3</sup> If that were not done, a pleader or for that matter an outsider can apply to be heard against the proposed compromise in the interests of the minor,—see observations of Subramania Aiyer, J. in the Madras case cited above. But on the other hand it has been decided by Courts that an apparently fair compromise on a decree founded thereon will not be annulled in a subsequent suit to set it aside on the sole ground of some technical defect or flaw in the procedure.

The Courts have always made a distinction between the substantial remedy available on the ground of prejudice to the minor's interest, and the said interests having technically suffered by reason of defective

1. *Vatigapershad v. Maharani*, 11 Cal., 379. (P. C.)

2. *Solomon v. Abdool Azeed*, 6 Cal., 687.

3. *Govindasami v. Alagiri Sami*, 29 Mad., 104. *Karamali v. Rahimbhoy*, 13 Bom., 127.

procedure.<sup>1</sup> The sanction however cannot be presumed by implication. A decree founded upon such sanction has been held to be a nullity.<sup>2</sup>

It is not within the scope of this work to enter into lengthy discussions and to take detailed notices of cases bearing on the effect of previous decisions in which a minor was a party upon subsequent litigations instituted or defended in the interests of the minor. The elaborate consideration of the law upon the subject by Garth, C. J., has evoked considerable discussions in many later rulings of Courts. These are all beside the mark and do not touch the important question which I am now considering; namely, that it is always in the power of the minor, both during his disability and afterwards, to protect his interests in a subsequent Civil Suit. But it is necessary distinctly to bear in mind, that the subsequent litigation by or against the minor himself or in his interest is always subject to the paramount equities of legal necessities or benefit to his estate. The first point that appears from the cases to have been well-settled is this,—that the result of a *fiduciary* litigation conducted with perfect fairness

has always the binding effect prescribed by the adjective law of procedure.<sup>3</sup> But in cases where the fairness of the previous trial is assailed on the ground of negligence, fraud, want of sanction, leave to adjust or to compromise, &c., such a matter is a preliminary point for enquiry upon which it depends whether the Court of law and of equity would rip open the transaction in dispute, and decide the matter afresh on its merits. All the cases of Courts to which references have been made in the current Indices of cases under I. L. R., 10 Cal., 357, are explainable only on the hypothesis of the aforesaid preliminary issue being tried and found in favour of the plea. If this view of the law be deducible from the authorities noticed and indicated above, it is hard to follow the view of Garth, C. J.,

1. Kalavati v. Chaudhailal, 17 All., 531. Aman Singh v. Narain Singh, 2 All., 98. Bansilal v. Chaudhailal, 20 All., 370.

2. Rajagopal v. Muttupalem, 3 Mad., 103. Ram Churn v. Mangal, 10 W. R., 232.

3. Eshan Chund v. Nundamoni, 10 Cal., 357. For the more approved and recent view on the subject see Barhamdeo v. Banarsi, 3 Cal., 1.

in an earlier ruling<sup>1</sup> in which a minor, overriding the effect of a previous mortgage, and execution sale thereunder, sought to recover his interest from the execution purchaser and his assignee on the sole ground that his certificated guardian who was his eldest brother, jointly inherited the estate with the minor from their father and omitted to take leave to mortgage the property. The said estate, as the report shows, comprised an ancestral trading business; and it apparently devolved on four brothers with a certain amount of pecuniary liability. The eldest brother as the manager of the family obtained a guardianship certificate under Act XI. of 1858. In order to discharge the liabilities, the guardian executed a mortgage on the security of the landed estate. This mortgage had not the requisite legal sanction of the Judge, and thus the transaction was voidable as against the minor. On coming to age, the minor sued to recover his interest, basing his ground of action on the sole reason that the unsanctioned mortgage was not legally binding on his interest in the property. At the hearing of the appeal before the High Court, it was strenuously argued by the opposite party, that on equitable grounds the minor's claim was subject to the pecuniary obligation, *pro tanto* to discharge the debt incurred by the manager of the family. This contention was overruled. It is very hard to follow the *ratio decidendi* which led up to an unconditional decree for land in favour of the claimant. We have seen it over and over again in this Chapter and elsewhere, that the paramount demands of legal necessity are not subservient to the technical rules of procedure, and that standing on its own footing, the actual necessity or benefit to the minor gives rise to an obligation of equitable refund or restitution of advantages which are behind the transactions reopened by the minor, either by way of review of the previous decision, or by the institution of a new suit.

Recent decisions of Courts have clearly laid down, that if the transaction charging the minor's estate be unsupportable in law, the actual benefit derived by the minor raises equitable considerations by way of refund<sup>2</sup> or restitution. Both these cases are governed by the Muhammedan Law of Guardianship. There is a

1. *Dube & Dutt v. Subodra*, 25 W. R., 449.

2. *Morjee Banku*, 29 Cal., 473. *Mafarzal v. Basid Shukh*, 34 Cal., 36.

analogy between the action of a certificated guardian affecting the land of the minor without the leave of the Court and the action of a Muhammedan relative, say a mother of her minor children, dealing with the vested interests of the latter. It is of course otherwise if the Muhammedan relative is invested with the rights of guardianship by the Judge's certificate. Without such a certificate, however, a Muhammedan mother is incompetent to sell or mortgage her minor children's interests without the support of strict legal necessity or benefit to the minor. Where such necessity or benefit is shown, the cancellation of the transaction is always contingent upon equitable restitution. In the first Calcutta case cited above, the litigation expenses incurred by the mother through the mortgagee who received a charge upon the minor's land with a heavy rate of interest at 18 per cent., were not held to come within

Equitable and for minor's benefit or legal necessity.

the category of legal necessities. For this reason, the minor recovered the estate from the clutches of the mortgagee. I have not however been able clearly to apprehend the principle enunciated by Rampini, J. that equity makes distinction in principle between the case of a minor suing and a minor sued against. It is not clear to me in what way the view of equity can be one-sided in that manner. Hence I have not been able to classify case-law of one kind of equity in one respect, and of another in a different respect arising out of the array of parties in the same transaction. Whatever that be, the same learned Judge in the second case cited above<sup>1</sup> affirmed the transaction of sale of a minor's estate, because it was held to be founded on valid debts and requirements for the minor's maintenance.

In one case,<sup>2</sup> the father for some reason or other, took no part in a necessary litigation. The interests of the minor were to suffer if the litigation had not been undertaken for the minor. It was the case of a Hindu minor. The elder brother acted as the *de facto* (of course, not *de jure*) guardian, when the father was living. The guardian borrowed money and executed a *Kobala* for legal necessity.

*De facto* guardian and legal necessity.

1. See also *Ramcharan v. Anukul*, 34 Cal., 65.

2. *Ganga v. Phool*, 10 W. R., 106.



The alienation by sale was not held to be invalid for "the want of the union of the *de facto* with the *de jure* title of guardianship." This early decision of Calcutta was cited in a later<sup>1</sup> case with approval by the same High Court. In both these cases the transaction of absolute sale of the minor's estate was supported though it was entered into by the *de facto* guardian. But there is an important feature in the later decision cited above, which is worthy of very serious consideration. It arose out of a contention raised in second appeal that the liberty or right of a *de facto* guardian did not extend, even under the pressure of legal necessity, absolutely to convey the minor's

estate if by an arrangement of mortgage at a reasonable rate of interest the minor's ownership could be saved, and the pressure

for the time being averted. We find a very inadequate treatment of this question in the decision of the learned Chief Justice.\* On the subject of the law of legal necessities and obligations, the Court observes that there is no distinction in principle between the right to sell, and to mortgage, on the part of the guardian with respect to the property of his ward. In other words, it is meant to lay

down that when the pressure of legal necessity arises for the management of the minor's estate, the guardian for the time being is not bound to see whether it would be ex-

pedient to mortgage the estate or to sell a part thereof to meet the exigencies for the time being. This, I respectfully submit, is too broad and sweeping a generalisation on the subject. Further, the ruling of the Court shows that though the Court of First Appeal did not expressly discuss the matters of legal necessity considered by the Court of first instance and state the precise ground of legal necessity for sale, a sort of general concurrence was inferred from this text of the appellate decision. It is impossible to endorse the view of the matter. I apprehend that for both these reasons the learned Judges of the Calcutta High Court should have referred back to the Lower Court the issue as to whether, having regard for the facts found in the Court of first instance as regards the pressure

Sale or mortgage for legal necessity by guardian?

Principle for the distinction of the legal necessities for sale and mortgage.

1. *Mohanund v. Nafur*, 26 Cal., 829.

of the legal necessity, a mortgage or a sale of the minor's estate would have been a more convenient or beneficial transaction ; and if need were the Lower Appellate Court should have been directed to remand the case to the Court of first instance for a fresh decision on the point. As shown in the previous chapters, there is no paucity of the case-law on the subject. We have seen the decisions of this country and of the Privy Council, wherein, having regard for the nature of the want or the necessity for alienation, the Courts have treated a sale by the widow, the manager of the joint estate, the trustee of endowed properties, and other fiduciary relations, in the light of a mortgage, and made equitable restitutions to the alienee. It may generally be observed that the jealousy of the law of legal necessity is less acute against a party who has some kind of vested interest in the alienated estate. The Hindu widow or any other female, the father or any other manager of the joint ancestral estate, occupy a superior position to what is occupied by a guardian, an executor, or a trustee of properties which are absolutely owned by others. The sense of comparative irresponsibility of these persons is easily distinguishable from the personal interest of the persons of the former class, who have interest for the time being in the estates in their charge. Then again, there are cases of excessive alienations, partial legal necessities &c., which supply to the Court of equity an infallible clue to decide whether, a sale, a mortgage, or even a lease would have been a more expedient arrangement. The Courts do not hesitate in their treatment of the transactions on equitable grounds, because the alienees are always presumed to have notice of the limited interests of the parties with whom they have dealt. In that view of the matter, I do not hesitate to question the soundness of the view enunciated in the later Calcutta decision noticed above, and I must most emphatically state that for reasons stated above, the Court of law and of equity, should recognize the existence of the distinction in principle as to what should be the nature of the alienation that is questioned before it on the ground of the want of legal necessity.

It does not seem to be material whether the guardian or manager should in the instrument describe himself as such, provided it be clear from the instrument that it is the infant's property which is being

Recital of legal necessity in the deed.

sold.<sup>1</sup> The sole criterion in such cases is legal necessity. Where it exists bare informality in the deed or in the proceedings of the Court will not avoid the result aimed at by the deed or arrived at by the proceeding. For payment of antecedent or ancestral debts, if the natural or adoptive mother sells estate belonging to a minor, the deed containing no reference to the minor or the status of guardianship, or if the proceedings of Court do not show that the minor was sued with a guardian *ad litem*, the transaction will not be annulled on that ground;<sup>2</sup> but if it be found that for a particular transaction no legal necessity is proved, it will be avoided.<sup>3</sup> And if legal necessity is shown in part but the consideration is found to be disproportionate to the real value of the estate alienated, or an advantage is shown to have been taken of the extremely needy and helpless condition of the guardian (widow-mother) and thus equities arise against the alienation, it will be set aside, the vendee being entitled to be recouped to the extent of any portion of the advance which has been utilized to the benefit of the minor.<sup>4</sup>

The deed is not necessarily vitiated for not containing any recital of the necessity on account of which the property is alienated<sup>5</sup> because the necessity can be proved by other evidence. Indeed, the Lordships of the Privy Council have laid it down very clearly that a recital of the necessity is by itself no evidence of the necessity.<sup>6</sup> It is, as an admission of the interested party, governed by Sec. 21 of the Indian Evidence Act. It is, at best, an index of the cautious dealing of the alienee.

The second principle laid down in the leading Privy Council case

Other principles of the leading Privy Council decision *re* guardianship over minor's estate.

(*Hanuman Prasad Panday*) is the following, in the words of their Lordships ;—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a

1. *Jadunath v. Tweedie*, 11 W. R., 20; *Nitya v. Ooeut*, 16 W. R., 241.

2. *Makundi v. Sarabsukh*, 6 All., 417; *Succaram v. Káldas*, 18 Bom., 631; *Natesayyam v. Naraseminayyar*, 11 Mad., 480.

3. *Murari v. Tayana*, 20 Bom., 286.

4. *Makundi v. Sarabsukh*, 6 All., 417.

5. *Womes v. Digumbaree*, 3 W. R., 154.

6. *Rajlaxhi v. Gokul*, 3 B. L. R., 57, P. C. 12 W. R., 47, P. C.

limited and a qualified power. It can only be exercised rightly in a case of need, and for the benefit of the estate."

Third principle :—"But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. \* \* \* \* \* Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt."

In *Maha Beer v. Dumresram*, W. R. of 1864, page 166, the purchaser was put to a severer test by the Courts below. 'He was held bound to show (1) existence of legal necessity *plus* (2) application of his money to that purpose. The lender proved the first, and it was held that unless his *mala fides* were proved for which obviously the *onus* was on the other side, the lender was bound to succeed. The necessity in this case was the payment of a family debt. It would appear from the foregoing two principles that after discharging his part of the *onus*, that is, after showing a necessity, the lender's position is secure.

Necessity has been used as signifying two different things : first personal *need* and secondly *family benefit*. The language used in the Privy Council case would seem to imply a very broad and comprehensive meaning of what is called legal necessity to bind the minor by his guardian's act. Such a liberal construction is obviously more beneficial to the lender than to the interests of the minor concerned. In the name, and with the avowed object of benefitting the family, the guardian or the manager may go on speculating in view of increasing the income, dig a well in the hope of irrigating a field, dig a tank to benefit the public, or to secure a good name for the family. The propriety and the necessity of each of these acts

Actual need is legal necessity. and of similar ones that can be conceived are matters of questionable legal necessity. We

accordingly find that the Courts of Law have considerably restricted the meaning of the second principle propounded by their Lordships

and they have held that it is the actual legal necessity alone that will justify the alienation.<sup>1</sup> It is the actual need of the minor and of his family, such as maintenance, support, and provision of decent necessities of life, that is meant.<sup>2</sup> Payment of debts of ancestor, from whom the minor acquired his property is another instance of legal necessity.<sup>3</sup> In *Dagdu v. Kamble*, 2 Bom. H. C. R., 380, the following observations occur :—"It is easy to conceive cases in which it would be far more beneficial to the heir, if he have no money or other personal estate out of which the debts may be paid to sell a portion of the immoveable estate in order to pay the debts of his ancestor or his own properly incurred debts for necessities rather than allow a heavy rate of interest on these debts to consume the whole of the estate. Such a partial sale might be the only means of preserving any portion of his patrimony."<sup>4</sup>

*Hanumanprasad's* case has given rise to a series of important decisions. It has been ruled that a person lending money on the security of an infant's estate or buying that estate is bound to exercise due care and attention in seeing that there was a legal necessity for the loan,<sup>5</sup> and must satisfy himself as well as he can<sup>6</sup> and as an honest man,<sup>7</sup> with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate,<sup>7</sup> and that circumstances of necessity had occurred which under the Hindu law would justify the alienation.<sup>8</sup>

In *Bhala v. Parbhu Hari* I. L. R., 2 Bom., 72, it was held that the payment by the widow of her husband's Barred debt a necessity. debt after it has been barred by limitation is such a necessity as will support an alienation

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1. *Radha v. Mustt. Talook*, 20 W. R., 38; *Runjeet v. Mahomed*, 21 W. R., 49.

2. *Deodem v. Doorgaprasad*, *Moorly's Digest*, Vol. II., p. 50.

3. *Mac. Hindu Law*, Vol. II, Chap. XI, case 6.

4. *Gourpershad v. Sheopershad*, 5 W. R., 103; *Syed Lodf v. Dursunlal*, 23 W. R., 424.

5. *Muthoora v. Kanoo*, 21 W. R., 287.

6. *Loolloo v. Rajender*, 8 W. R., 364.

7. *Lalla Bunsidhar v. Koonwar Bindeseree*, 10 M. I. A., 471; *Trimbuck v. Gopal Sett*, 1 Bom. H. C. R., 27.

8. *Kasheenath v. Chunder Mohun*, 14 S. D. A., 1791.

by her. This view is also expressed in another decision by the same High Court.<sup>1</sup> It is said :—"The widow's moral obligation could not be obliterated by the circumstance that the law of limitation barred a suit against the widow for the recovery of the debts in question." A *dictum*<sup>2</sup> to the contrary is referred to in Mayne in terms of disapproval from the strict moral point of view. Following these views, the Bombay High Court upheld the alienation by a childless Hindu widow of her estate for payment of debts of her father-in-law whose estate she inherited, and the reversioner's suit to restrict the alienation within her life-time failed. A manager of a joint Hindu family has authority to renew and to acknowledge the liability of the family for legal and necessary debts of the family within the meaning

Acknowledgment of debt. Conflict of views. of Sec. 19 of the Limitation Act.<sup>3</sup> This has rendered the earlier Madras ruling in "*Kumarsami v. Pala*, I. L. R., 1 Mad., 385 inapplicable.

By the same reasoning and by following the principle of the above rulings, it has been held by the Madras High Court that by repayment or acknowledgment, a mother acting as her minor son's guardian can keep alive a debt incurred for legal necessity. It is argued that he or she who can contract a necessary debt or bring it into being can also keep it alive.<sup>4</sup> The Calcutta decisions are the other way.<sup>5</sup> In one of the Calcutta cases, it has been held that a suit on account stated cannot succeed, unless it be shown that the guardian's statement of the account benefitted the minor, but that guardian's acknowledgment did not bind the minor within the meaning of Sec. 19 of the Limitation Act. A decision by the High Court of Bombay<sup>6</sup> has followed the Calcutta view dissenting from *Sobhanadri v. Sreramula*, I. L. R., 17 Mad., 221.

1. *Chimnaje v. Dinkar*, 11 Bom., 320.

2. *Melgirappa v. Shivappa*, 6 Bom. H. C. R., 270.

3. *Bhaskar v. Vijalal*, 17 Bom., 512 following the Full Bench decision of the Madras High Court in *Chimnya v. Gurunathan*, 5 Mad., 169.

4. *Kailasa v. Ponnu Kannu*, 18 Mad., 456: the Calcutta decision *Wajiban v. Kadir*, 13 Cal., 292, 295 has been disented from; *Chimnya v. Gurunathan* 5 Mad., 169; *Sobhanadri v. Sreramula*, 17 Mad., 221 and *Bhaskar v. Vijalal*, 17 Bom., 512.

5. *Aynddin v. Lloyd*, 13 C. L. R., 112; compare also *Chattooram v. Sheikh Beltoo*, 2 C. W. N., CCXXXIV; 26 Cal., 51.

6. *Maharana Sri Ranmal v. Vadilal*, 20 Bom., 61.

Thus there is, at present, a clear conflict of views on the subject of minor's liability and a fresh start for limitation under Sec. 19 of the Limitation Act under an acknowledgment by a guardian. The Bombay High Court draws a distinction between the power of a manager to bind his adult coparceners, and that of a guardian, his ward. An implied agency of the former is presumed, whereas such implication and delegation of authority by a minor are held impossible. However that may be, the important points which the recent Bombay ruling lay down deserve reproduction :—

- (i) There is nothing in Indian law which gives a guardian power to bind the minor personally by acknowledgment or contract of any kind. The remarks of the Privy Council in *Waghala v. Shekh Masbidin*, I. L. R., 11 Bom., 551 (p. 561) were followed.
- (ii) A guardian can charge the minor's estate for necessary expenses, to wit, funeral expenses actually incurred of the deceased father.<sup>1</sup>
- (iii) If the debts were incurred for "necessaries" (*vide* Simpson on Infants, page 93) the minor would be bound to pay them on the general principle embodied in Sec. 68 of the Contract Act.<sup>2</sup>
- (iv) Moveable properties belonging to the minor can be pledged in the same way as the immoveable properties can be charged, that is, for legal necessity.
- (v) Under the Bombay Minor's Act (XX of 1864) marriage expenses cannot be incurred without sanction. Debt, mortgage, or pledge therefor is invalid. In other parts of India this restriction does not apply. But to spend full one year's income is disproportionate (*vide* facts in page 72).
- (vi) After coming under the Act (Guardians and Wards) the guardian though he is the *de facto* manager of

1. *Nathuram v. Shoma*, 14 Bom., 562.

2. *Walter v. Everard*, (1891) 2 Q. B., 369.

the family property, cannot claim validity for transactions which are under the law void for want of sanction.<sup>1</sup>

- (vii) Pilgrimage expense which, within reasonable limits, may be a legal necessity for a widow to charge her husband's estate, is not a "necessary" expenditure, so far as the estate of the minor is concerned. No part of such expense can be charged against the minor's estate.

Mitakshara, Chap. I, Sec. I, paras 28 and 29 already quoted contain certain *placita* concerning donation, mortgage, or sale of coparcener's estate. It is said that such a transaction can be justified only to avert a season of distress, for the sake of family and for pious purposes. Regarding minors and incapables, it is laid down that gift, mortgage, or sale is permissible if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable. The above texts relate to coparceners and minors living joint. Following the principle

of the above text, the Bombay High Court annulled the gift of a joint estate made by the adults in which the minor had an  $\frac{1}{6}$ th share. The gift was ostensibly made to a worshipper of a temple for the support of the deity. This was not held to be a necessity or a pious duty contemplated by law. An attempt to validate the gift to the extent of  $\frac{5}{8}$ ths share was not allowed.<sup>2</sup>

For some years, after the passing of the Guardians Act in 1858, a strong misapprehension prevailed which accounts for a great divergence of views as to the necessity or otherwise of taking out the guardian's certificate and obtaining the Court's sanction previous to the dealing with the minor's estate by the guardians. Act XL of 1858 was in force not in Bengal proper alone, but it was in the Lower Provinces that a regular crop of cases came up, and Bombay

1. *Shurrut v. Rajkissen*, 15 B. L. R., 350; *Bhupendra v. Nemye Chand*, 15 Cal., 629 (p. 634).

2. *Kalu v. Barsu*, 19 Bom., 803.



followed suit. The earlier rulings of Calcutta and of Bombay<sup>1</sup> which went the length of laying down that it was obligatory to obtain a certificate of guardianship to validate the transaction, legal necessity notwithstanding, can no longer be maintained.<sup>2</sup> An apparent conflict of views appeared in two rulings passed by two different Benches of the Calcutta High Court on the same subject.<sup>3</sup> The later ruling makes a footnote reference to the contrary view expressed in the earlier. Both are cases of clear legal necessities. The later judgment decided that the guardian mother of a Hindu minor, acting *bona fide*, and under the pressure of necessity may sell the minor's real estate to pay ancestral debts and to provide for the maintenance of the minor. But neither the learned Judges in this case nor those of a Bench of Allahabad<sup>4</sup> which followed the same view tried to distinguish *Abbassi's* case in I. L. R., 4 Cal., 33 by noticing the significant fact that the earlier ruling was a case of a Mahomedan minor, governed by the peculiar doctrines of Mahomedan law already referred to. These conflicts led to a Full Bench Reference in the same year,<sup>5</sup> which has definitely ruled that Act XL of 1858 was barely an enabling enactment, intended to remove some legislative prohibitions, and to confer expressly a certain jurisdiction without interfering with or affecting the rules of Hindu or Mahomedan Law that regulates the personal relations and the *status* of the parties.

During the course of the argument in the F. B. decision noted above, reference was made, no doubt very appropriately, to the powers of a manager in a joint family comprising minor coparceners. Minor a joint coparcener. Certain rulings of High Courts have laid it down that no guardianship certificate is necessary;—indeed a guardian cannot legally be appointed, to represent the estate<sup>6</sup> of a minor coparcener.

1. Mark notably *Khetternath v. Ram Jadoo*, 24 W. R., 49; *Kuvarji v. Moti*, 3 Bom., 234.

2. *Mani Shanker v. Bai Muli*, 12 Bom., 686; *Honapa v. Mhalpai*, 15 Bom., 259.

3. Compare *Abhassi v. Moharanee Rajroop*, 4 Cal., 33; and *Soonder v. Bennudram*, 4 Cal., 76.

4. *Roshun v. Harkishan*, 3 All., 535.

5. *Ramchander v. Brojonath*, 4 Cal., 929, F. B.

6. *Jhabbu v. Ganga*, 17 All., 529; *Virupakshappa v. Nilgangava*, 19 Bom., 390; *Shamkuar v. Mahananda*, 19 Cal., 301.

As instances of alienation of minor's estate by guardians for legal necessities the following may be noted. The *Sradh* expenses for the deceased father are legal necessities, and sale of a part of the estate to pay *Sradh* debts is valid. The money borrowed for *Sradh* and maintenance is payable by sale, if no other means for repayment exists. The purchaser is not bound to see how the money is applied. He must, however, prove his *bona fides*.<sup>1</sup> The marriage of a Hindu minor, reasonable with reference to the social and pecuniary position of the family,<sup>2</sup> expenses for the marriage of close female relations, dependent members of the joint family,<sup>3</sup> are necessities for which the minor's estate is liable. The question of legal necessity being, as we have repeatedly seen, a mixed question of law and fact for the Judge to decide, the aforesaid purposes as well as many others, which we will consider, deserve scrutiny before they can be ranked as true legal necessities. For instance, expenses or debt for *Sradh* which the minor owner is not, under the *Shastras*, under a legal or pious obligation to perform, for luxurious and disproportionate *Sradh* ceremony or marriage, for marriages of cognatic or agnatic relations or strangers, which the late encumbent, whom the minor represents, was under no obligation to provide for, will not be regarded as legal necessities to justify alienation of minor's estate. The customs, the requisites, and the legal incidents of marriages and other expensive ceremonies among the Mahomedans, the Christians, the Parsis and others have to be inquired into and considered, before the necessity therefor can be declared.

Though the minor's marriage is a legal necessity, it has been held<sup>4</sup> that a reckless and imprudent alienation of the minor's estate by his guardian cannot be supported. In this case, the minor's mother sold a house worth Rs. 1,500 for Rs. 350, ostensibly for the minor's marriage and maintenance expenses. After attaining majority, the boy repudiated the transaction. The sale was set aside subject to the equitable refund to the alienee of the amount that was actually spent for the minor by his mother. The

1. *Sukeenah v. Huro Churn*, 6 W. R., 34.
2. *Juggesur v. Nilambar*, 3 W. R., 217.
3. *Priag v. Ajodhyaprasad*, 7 Sel. Rep., 513.
4. *Durgaprasad v. Munsii*, 6 All., 417.

case was remanded for trial upon that issue. The learned Judges applied the principle of the ruling at 3 W. R., 217 with respect to the legal necessity for the minor's marriage by his guardian. But they did not notice the improper form in which the decree against the minor was passed in the earlier case. A personal decree for money on the bond executed by the guardian against a minor was bad in law, because the contract<sup>1</sup> did not bind the minor personally. A decree against the assets of the minor was all that could be

passed in such a case. In the Allahabad case  
 Recital in the deed just cited as well as in a later case of Bom-  
 immaterial. bay<sup>2</sup> it has been ruled that the non-recital of

the necessary purpose in the deed executed by the guardian has no materiality against the fact of the real purpose of legal necessity, if the same is established by evidence. The Bombay case was of a document executed by the guardian mother to repay her deceased husband's debt.

Litigation expenses arising out of suits which in the event  
 proved beneficial to the estate are chargeable  
*Bona fide* litigation as legal necessity.<sup>3</sup> But where, on facts found,  
 expenses by or for the litigation is not maintained on behalf  
 minors: legal neces- of the minor in a *bona fide* manner, the ex-  
 penses incurred cannot be recovered from the minor's estate.<sup>4</sup> In

the Madras case, the guardian *ad litem* received advances from the plaintiff for the purposes of his defence in the interests of the minor. The said defence comprised a plea that the minor's father had incurred an immoral debt which could not bind the minor's estate in a claim for Specific Performance. The plea was found to be groundless, and thus it was held that the plaintiff was not entitled to recover his money. The Court referred to a previous decision passed by the same High Court. It arose out of a subsequent litigation started by a solicitor for costs incurred by him for the next friend of a minor.<sup>5</sup> The only reason for dismissing the

1. Maharana Sri v. Vadilal, 20 Bom., 61.

2. Murari v. Tayana, 20 Bom., 286.

3. Gunga pershad v. Phool Singh, 10 W. R. 106. Mussamut Syedun v. Syud Velayet, 17 W. R. 238. Watkins v. Dhunnoo Babu, 8 C. L. R. 433=7 Cal. 140. Sham v. Choudhry Debya 21 Cal. 872.

4. Venkata v. Timmayya, 22 Mad. 314.

5. Branson v. Appasami, 17 Mad. 257.

plaintiff's suit was, that the *quondam* minor was not the direct contracting party with the plaintiff and that the plaintiff did not put forward his claim on the lines of Sec. 68 of the Contract Act. But the learned Judges went too far in stating that even on the assumption that the *quondam* minor was benefited by the expenses, though he repudiated the action on attaining majority, his estate was not liable for the solicitor's costs. But, according to this judgment, there can be no doubt that in such cases the plaintiff is bound to put forward, at the outset, a proper case of actual benefit to the minor and of reasonable and *bona fide* belief on the part of the plaintiff in that respect.

Valid and *bona fide* expenses incurred by a Hindu widow or by the head of a religious endowment, to maintain the estate of the widow or of the shrine, have been considered to be recoverable from the successor, apart from the question of the result of the litigations for which the said expenses had been incurred.<sup>1</sup>

In respect of claims founded on bonds or on mortgage-deeds made against the properties of minors, idols, lunatics, and so forth, the courts of law and equity closely examine the details of the debts in order to separate the debts of legal necessity from those of a personal character. In a case<sup>2</sup> of First Appeal the Allahabad High Court closely examined the details of accounts which formed the basis of bonds executed by the *Mohunt* of a rich shrine. The bulk of the consideration was for litigation expenses which were incurred by the debtor before the Privy Council. The original civil action was to recover the shrine-properties from usurpation. But a portion of the debt was spent for criminal cases which the debtor had undertaken to prosecute and to defend in order to rescue the estate from the hands of trespassers. This was an act of wastefulness for which the expenses so incurred were eliminated from the claim of the creditor against the endowed lands. In the exercise of their wise discretion, and in order to save the shrine-properties from immediate execution sale, an ins-

Items of necessary debts closely scrutinized.

1. Shankar v. Venkappa, 9 Bom 422.

2. Parsotam Gir v. Dat Gir, 25 All, 296.

talment decree was passed to enable the head of the temple gradually to discharge the decree from the current income of the shrine.

Connected with the subject of litigation expenses on behalf of the minor, suing or sued against, are the usual matters of settlements of contentious disputes effected by guardians with the opposite parties. The Courts of law and equity set their face against reckless prosecutions on the one hand, and needless defences on the other. Fair settlements and compromises *bona fide* entered into with the leave of the Court would, it seems to me, be hardly disturbed. I need

Settlement or compromise *re* minor's estate.

here only quote three Privy Council cases<sup>1</sup> bearing on the question, and state generally that the compromise of a doubtful right is a sufficient foundation for an agreement among the members of a family and shall be<sup>2</sup> binding on them. In another case<sup>3</sup> before the Privy Council, a *raffanama*, that is to say, a deed of final settlement of disputed contentions involving the interests of a minor proprietor was held to be binding on the successor. It was found, as a question of fact, that the terms of the settlement were adhered to and respected by successive generations coming after the minor proprietor. The adverse finding of the District Judge, that the stamp of finality sought to be impressed on the terms of the *raffanama* was harsh and detrimental to the minor, was considered by the High Court and by the Privy Council as not supported by evidence and the probabilities of the case.

In cases which arise out of simple money-bonds, acknowledgements of debt, accounts, *hat-chitta*, and parol agreements to pay, executed or contracted by the guardian of a minor, the *sebit* of a temple, and other fiduciary relations, the question often arises whether a decree can be sought charging the estate of the proprietor. The complication mainly arises when the actual contracting party dies, or is removed and a successor steps in his shoes.

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1. *Unnoda v. M. L. Stevenson*, 22 W. R. 290 (P. C.); *Watson and Co. v. Shamlal*, 15 Cal. 8 (P. C.); *Kali Dutt v. Abdul Ali*, 16 Cal. 627 (P. C.)

2. *Rameshwar v. Lachmi*, 31 Cal. 111.

3. *Hemanta v. Brajendro*, 17 Cal. 875 (P. C.)

In a well considered decision<sup>1</sup> passed by Sergeant, C. J., the High Court of Bombay passed the decree as if the debt were one of mortgage or of charge created in favour of the creditor. Such a decree

is, of course, only possible, if the obligation  
Decree charging the estate for money debt. was primarily one of legal necessity. Even

then, the Courts have the inherent power to reduce the contractual rate of interest to the prevailing normal rate for which the required loan could be obtained.<sup>2</sup> In the case before their Lordships of the Privy Council just noted, the widow for herself, and for her minor adopted son, executed a mortgage of the properties to secure advances to meet litigation expenses, maintenance of the family, and of the shrine.

Items scrutinized.

During the pendency of the creditor's appeal in the High Court of Calcutta, the widow died; and in her place the reversioners were impleaded as respondents. It was held that there was no sufficient proof for the amount of the actual litigation expenses. Hence that item was eliminated from the claim. On the question of repayments pleaded against the claim, the High Court of Madras in another<sup>3</sup> case of the same nature ruled that although the widow was not bound to make any repayment out of the income of the estate, yet, if any repayment is actually made by her from the proceeds of the sale of her husband's property, the creditor is not entitled to appropriate the same towards the personal debt of the widow; but that he is bound to apply it to the reduction of the valid debt of legal necessity to relieve the reversioners from the charge on their estate for such debt.

Courts often make a distinction between what is called a benefit to the minor and his legal necessities.

Benefit and actual necessity.

A sale or a mortgage of real property of a Hindu minor is hardly allowed to stand if it is only for the minor's benefit, and not for his legal necessity as well. "There is not as far as I know," says Mr. Trevelyan in his T. L. Lec. of 1877, "a single reported case decided by an Indian Court where a sale (or a mortgage) has been upheld on the ground

1. Shankar Bharati v. Venkapa, 9 Bom. 422.

2. Hurro Nath v. Randhir, 18 Cal. 311 (P. C.)

3. Ramasami v. Mangaikarasu, 18 Mad. 113.

of its being for the *benefit* of the minor apart from the reason of its being justified by necessity." The digging of a tank or a well, the rebuilding of a house, taking a speculative lease, borrowing to embark on usurious dealings, trade, partnership or the like, may all be intended to conduce to the minor's benefit. But no Court, it is apprehended, will uphold an alienation of a minor's property for such prospective future benefit only. If, however, before avoidance or ratification, an advantage has been derived or a benefit enjoyed by the minor, the Court of equity will recompense the benefactor to the extent of the enjoyment. But out of the several specified kinds of legal necessities enumerated by the Mahomedan Law, there is one which will allow a sale where a clear advantage is thereby to be gained for the infant.<sup>1</sup> Similarly for bare benefit to the minor, a Mahomedan guardian can dispose of moveable property.<sup>2</sup>

If the lender of money, by bond, mortgage, or sale, has acted honestly and satisfied himself that a necessity existed, he is free and is not bound to see to the application.<sup>3</sup> The lender need not inquire into the causes or the exact amount necessary or what is otherwise available.<sup>4</sup> If however, the lender *knows* or by ordinary diligence *could have known* that funds are available and are sufficient to pay the debt, the sale could not be valid.<sup>5</sup>

If the lender dealt with the head of a joint family, and one of the members is a minor, the creditor seeking to enforce his claim against the family property must see that the transaction is entered into for some common family necessity or for the necessities of the infant.<sup>6</sup>

1. Compare *Mustt. Bukshun v. Mustt. Dulhin*, 12 W. R., 337.

2. *Mustt. Syedun v. Syud Velayet*, 17 W. R., 239. Compare *Macnaghten's Principles*, Chap. VIII, principle 15.

3. *Radha Kishore v. Mirtoonjoy*, 7 W. R., 23. *Sukeenah v. Haro Churn*, 6 W. R., 34. *Mahabeer v. Dumreeram*, W. R., 1864, 166; *Gomain v. Prannath*, 1 W. R., 14.

4. *Mahabeer v. Joobha*, 16 W. R., 221; *Gomain v. Prannath*, 1 W. R., 14; *Ganganarain v. Gopeenath*, 2 Gov. Rep., 251.

5. *Kaleenaraian v. Ram Coomar*, W. R. (1864), 99. *Kandhialal v. Muna Bibi*, 20 All., 135.

6. *Trimbak v. Gopal*, 1 Bom. H. C. R., 27. *Tandavaraya v. Yali*, 1 Mad. H. C. R., 398.

If he deals with a *pardanasheen* guardian he must, in order to prevent the presumption of fraud or undue advantage that will surely arise, see that the borrower acted with proper advice as to legal necessity.<sup>1</sup>

A needless loan to a *purda* woman and mortgage effected by her was set aside at her own instance.<sup>2</sup> It is not enough to show that there was no coercion, that she executed the deed voluntarily, and that she herself knew the contents or even their full legal effect. The Court must be satisfied that the transaction was a fair and an equitable one, and that it was settled in the presence of competent and disinterested advisers.<sup>3</sup> In one case before the Privy Council, between the minor's reversioners in expectancy and their grandmother (mother's mother), an old *purda* lady, there was their (minor's) mother. The old lady and her son-in-law,—the latter, acting as the minor's guardian and their mother's manager and grandmother's agent under a power, executed a mortgage of the family estate for a heavy amount. The deed was drawn in a guarded manner. It was proved that there was an independent advice emanating from the immediate reversioner's manager, a trusted agent, and the remoter reversioner's guardian. The deed was explained word by word. It was also shown that there was family business from the time of the last owner of which the mortgagees were the bankers. The first Court contravened, probably misled by the aforesaid circumstances, the unbending rule laid down in *Hanuman Prasad Pandey's case* as to *onus*, and drew an issue on the defendants to show that there was no legal necessity for the loan which was sought to be enforced. The defendants having failed to prove the negative, the claim was decreed. The High Court on appeal granted an indulgence to the plaintiff, probably to rectify the mistake of the Court below, and gave to the plaintiff another opportunity to prove the legal necessity for the loan. Vague evidence was offered which did not connect the loan with actual and pressing necessity on the estate. The claim was dismissed up to the

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1. *Lalla Bunseedhar v. Koonwar Bindeseri*, 10 M. I. A., 471; *Asgar Ali v. Delross*, 3 Cal. 327, P. C.; *Beharilal v. Habibali*, 8 All., 267; *Mustt Radha v. Tiku*, 5 C. L. R., 72; *Mariam Bibi v. Sakina*, 14 All., 8.

2. *Mustt Atta Kour v. Bhojraj*, 3 C. P. L. R., 118.

3. *Mustt Juar Kuar v. Maganraj*, 6 C. P. L. R., 35.



Privy Council.<sup>1</sup> As an instance of *gosha* ladies being liable personally and to the extent of their estate when acting under good and reliable advice vide *Badi Bibi v. Sami Pillai*, I. L. R. 18 Mad., 257 (p.262).

The existence of necessity such as the repayment of a debt or the discharge of a decree is not the sole criterion for the disposal of a minor's estate by his guardian. An instructive early case<sup>2</sup> on the subject was decided in Calcutta in 1868. The plaintiff, on attaining majority, impugned the sale of valuable *mahals* effected by his mother, a *purda* lady, in favour of persons who were mortgagees in possession from the time of the plaintiff's deceased father. Both the lower Courts dismissed the plaintiff's suit on the ground that there was a necessity pressing hard on the minor's mother to discharge an outstanding decree and attachment of other properties belonging to the minor. In spite of the concurrent findings of fact of both the Courts below, the learned Judges of the High Court of Calcutta pointed out in the clearest possible manner that a very heavy burden of proof lay upon the mortgagees of the estate in their dealings with a *purda* lady to show what the precise amount of their mortgage debt was at the time of the sales in their favour. They were bound also to show that the *purda* lady had independent advice to go by, and that fair and adequate prices for the *mahals* were fixed for their sales. The case was remanded to the Court below for a careful and a detailed inquiry into the reasons and the necessities for the sale, and it was pointed out that persons like trusted servants, legal advisers,<sup>3</sup> and mortgagees in possession stood in active confidence and held such a fiduciary character that a heavy *onus* lay on them to show the extreme fairness of their dealings in order to support alienations of minors' estates in their favour. Subsequently, these principles were embodied in the law by section 111 of Act I of 1872.

Lunatic owners of estate occupy the same position as the minor proprietors. For the protection of the estate of these classes of persons, Lunatics Act XXXV of 1858 has made similar provisions as are

1. *Amarnath v. Achan Kuar*, 14 All., 420 (P.C.) Compare *Mariam Bibi v. Sakina*, 14 All., 8

2. *Roop Narain v. Gangadhar*, 9 W. R., 297

3. *R. A. Poushong v. Moonia*, 10 W. R. 128

embodied in the Guardians and Wards Act. In a Bombay case,<sup>1</sup> the ancestral property belonged to a man and his two minor sons. The former was a lunatic. The Court granted the manager's certificate to his wife, who was also the natural guardian of her minor sons. Without the leave of the Court she mortgaged certain ancestral land for an alleged family purpose. Following the principle of the cases under the Guardians and Wards Act which has laid down

Lunatics' and minors' estates. Alienation for legal necessity.

the law that an unsanctioned alienation by a certificated guardian cannot be enforced against the minor and his estate, the High Court of Bombay ruled that though the interest of the lunatic husband was not validly mortgaged by his wife, she was otherwise competent to encumber the interest of her minor sons, if they were benefitted by the transaction. The Court upheld the equitable doctrine of benefit to the estate, and remanded the suit for the trial and finding on the issue whether the purchaser of the quondam minor's property could recover possession of the estate without refunding to the mortgagee the requisite amount of legal necessity with reference to the benefit derived by the lunatic as well as the minors by the mortgage transaction. Following this view, the High Court of Allahabad held, in a case<sup>2</sup> of Muhammadan uncle of a minor proprietor, that although the said uncle was not under the Muhammadan Law the legal guardian of his nephew and although for that reason the mortgage of property executed by him could not be supported and the claim founded on the mortgage thus failed, the learned Judges left it an open question in their decision that should the mortgagee bring an action for compensation for the benefit derived by the minor and his estate, he was entitled to recover. The Court pointed out the distinction between a suit instituted to enforce an alienation in such cases and a suit to set it aside. In both classes of suits, it is apprehended, equitable restitution to the extent of the legal necessity or benefit is a principle well-settled by authorities.<sup>3</sup> But there are, in the reported

Rulings.—not ordering equitable restitution questioned.

cases, decisions passed in suits to set aside or to enforce alienations in contravention of the provisions regarding sanction for them.

1. *Annapurnabai v. Durgapa*, 20 Bom. 150.
2. *Nizam-ud-din v. Anandi*, 18 All., 378.
3. *Surut v. Ashootosh*, 24 W. R., 46.

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In these cases the alienations have been wholly set aside without making equitable restitution of benefits derived. For instance, in the cases noted below,<sup>1</sup> the learned Judges of Calcutta and Allahabad have passed unconditional decree wholly setting aside the transactions without making any equitable refund in deference to the principle of legal necessity. In the Calcutta case the debts of family business were discharged; and in the earlier Allahabad case ancestral debts were paid off, an impending execution sale of ancestral property averted by the execution of mortgages. It would, however, appear from later decisions of the same High Courts<sup>2</sup> that the decisions in such cases ought not to be so one-sided, but that Law and Equity must go hand in hand. The Calcutta case was one of lease by a certificated guardian without the leave of the Court. That was therefore a transaction, ordinarily speaking, of no antecedent legal necessity; yet the learned Judges have remarked, that "it is possible that there may be circumstances under which a lease for more than five years, given by a certificated guardian without the sanction of the Court, might be held good and valid for the term of five years for which he was competent to grant it." But the lease in this case was wholly set aside on the sole ground that the lease was not a lease for a term, but practically a permanent alienation of the landlord's estate subject to a rent charge. It was also, of course, voidable for want of sanction.

<sup>1</sup> It will follow from what we have said above that in deference to the adjective law of procedure contained in chapter XXXI of the Code of Civil Procedure, a certificate of management for a lunatic proprietor is a *sine qua non*. If the lunacy had been congenital, and the insane person got no estate by inheritance, no question of his estate or certificate will arise. But if after the vesting of inheritance on acquisition of rights or of property, lunacy occurs, a certificate is indispensable for a suit either in favour of or against the lunatic. We do not go the length of saying that the adjective law (C. P. Code or

1. Dabee Dutt v. Subodra, 25 W. R., 449; Chimman Singh v. Subran Kuar, 2 All., 902-3; Maujiram v. Tarasingh, 3 All., 852.

2. Girraj v. Kazi Hamid, 9 All., 340; Harendra v. Moran, 15 Cal., 40.

Act XXXV of 1858) prevents the passing of valid estate by transactions effected by *de jure* and *de facto* guardians, but when the rights cannot be enforced without representation in Court, a certificate is indispensable. In this respect, the substantive law of rights and titles is the same, whether the proprietor is a lunatic or a minor.

In provinces governed by the Mitakshara School of law, a joint family may consist of lunatics, minors, and adults,—all strictly and legally coparceners. It appears, that as it is impossible to predicate what interest each coparcener is possessed of, no kind of certificate is necessary or rather none can be got: vide the decision of the High Court of Bombay.<sup>1</sup> "There is a very close analogy," says Farran, J., "between the position of a lunatic and of an infant in relation to such property, and much of the reasoning of the Full Bench in *Virupakshappa v. Nilgangava*, I. L. R. 19 Bom. 309, is applicable to the case before us."

Judicial recognition goes a great way to validate the guardian's act, even if there had been a technical failure on the part of the guardian to obtain the requisite sanction of the Court. If, for instance, an unauthorized alienation has merged in a Court's decree, and it appears that the minor's interests were sufficiently represented and safe-guarded, and if the proceedings show that the transaction was a distinct benefit and an act of legal necessity, there will be no reversal of the proceedings on the sole ground that the transaction had not been assented to by the Court. In the Calcutta cases cited below, the guardian holding the certificate<sup>2</sup> mortgaged the minor's interest without sanction; but he obviously did so for legal necessity. The mortgagee got a decree which he enforced by sale. The sale was not allowed to be questioned. In another case *bona fide* representation by the *de facto* manager was held binding on the alleged insane, though no certificate was taken.<sup>3</sup>

1. *Trimbuck Lal v. Haralal*, 20 Bom., 659. Compare also *Bandhu Prasad v. Dhiraji Kuar*, 20 All., 400.

2. *Sreemutty Ahfutoonnissa v. Goluck Chunder*, 22 W. R., 77; *Tilkoer v. Roy Anundkissore*, 10 C. L. R., 547.

3. *Kalachand v. Sreemutty Shoolochna*, 22 W. R., 33.

The Court of law represents the ruling power. Matters of technical form or procedure are principles of an adjective law. Where it is clear that the estate of a minor or of a lunatic has been closely and scrupulously watched by the Court, the transaction is safe. The text of Manu, chapter VIII, sloka 27 is the following.—

"27. The property of a student and of an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year."

Sir Thomas Strange considers the propriety of extending the words of the text so as to make them applicable in regard to all persons incapable of taking care of themselves. This includes lunatics and others of that description.

With the above text must be read the well known text of the Mitakshara which occurs in Colebrooke's translation, and which being of frequent application to joint Hindu families of all sorts, has been considered in a previous chapter. The text is the following:—

"28. Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family and specially for pious purposes." In para 29 it is said, "the meaning of the text is this : while the sons and the grandsons are minors and incapable of giving their consent to a gift and the like, or while the brothers are so and continue unseparated, even one person, who is capable may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." In one case,<sup>1</sup> the sale of the lunatic's estate was effected by the manager for legal necessity. It was to satisfy a decree for ancestral debt which the decree-holder was about to execute against the property. The manager himself was also a joint owner. The manager held no certificate under the Lunatics Act ; yet the sale was upheld.<sup>2</sup>

1. *Gourinath v Collector of Monghyr*, 7 W. R. 5.

2. Followed in *Kanti v. Bisheswar*, 25 Cal. 585 (2 C. W. N. cxxvii) which disapproves *Comt of Wards v Kuilumun*, 19 W. R. 163. Compare *Ramchunder v. Brojonath*, 4 Cal. 929 (F.B.)

The numerous case-law that presents views of different kinds in respect of alienations of minor's and lunatic's interests in a joint concern is reconcilable with the texts quoted. Whenever the facts of a case are not consistent with, or are not fully covered by the texts, the courts of law and of equity have shown a leaning in favour of the incapable person. The guardian or the manager of the interests of a minor, a lunatic or any other incapable person, whether the said interests are joint or separate, and whether the said manager or guardian be the holder of a certificate or not, the above quoted principles apply to them equally. There have, indeed, been cases, of which the one reported in 22 W. R., p. 77 is the one in which the subsequent judicial recognition of clear legal necessity was held to validate the transaction.—(See also *Tilkoer v. Roy Anund*, 10 C. L. R., 547).

In a First Appeal<sup>1</sup> decided in the High Court of Bombay, the question before the Court was whether the loan incurred by the certificated guardian (mother) for the marriage expenses of her ward, pilgrimage expenses incurred to redeem her vow for the supposed benefit of her child, could be regarded as legal necessities so as to bind the minor's estate for the debt. The next question before the Court was whether it was in the power of the guardian, certificated or not, to renew the debt or to give to it a fresh start of limitation by an acknowledgment. All the three questions have been answered by the Judges in the negative. On the subject of the loan for marriage expenses incurred by the mother (guardian) it would appear that by reason of her taking out a Certificate of Guardianship, she came within the prohibition of law under the special legislation then in force in Bombay by Act XX of 1864. That Act has now been repealed by Act VIII of 1890. During the time of twenty-six years that it was in force in the Bombay Presidency, that law gave effect to an administrative policy to curtail the ruinous marriage expenses in families of high position and birth. There was, therefore, a provision in that law enjoining the necessity of obtaining the sanction of the Court for the marriage, and the expenses therefor, of the minor,

Representation asserted in judicial recognition.  
Minor's marriage expenses, Guardian's pilgrimage, acknowledgment of debt, Legal necessity.

1. *Maharana v. Vadilal*, 20 Bom. 61

on the part of the ~~certificated~~ guardian. Clearly then, the law had no application to the case of uncertificated guardians. The present law in force contains no corresponding provision regarding marriage expenses. This law is now in force throughout British India. Apart from the point arising out of special legislation, it can hardly be contended that reasonable expenses for marriage contracted at the proper age of the minor, boy or girl, which is intended to maintain the prestige of the family, and to secure the continuity of the line, can fail to fall within the category of legal necessities. It is probably right, that unless the avowed pilgrimage was directly undertaken in good faith for the spiritual welfare of the deceased owner and that within reasonable limits, an expensive and luxurious tour of pilgrimage as in the case cited, can hardly come as a binding legal necessity on the minor's estate. With respect to the point of limitation as to whether the guardian can give a fresh lease of life to the claim of legal necessity of the minor, the opinion expressed in the Bombay case cited has been dissented from in later<sup>1</sup> rulings.

A mother in some cases can protect the minor son's interests when they are wasted by the father. If, then, the father becomes unfit, the minor's mother may intervene; and it has been ruled that notwithstanding the general wording of Sec. 457 of the Code of Civil Procedure, the Court will allow the mother, a married woman, to come to her minor son's rescue, and protect his interests from the dissipations of his father.<sup>2</sup> When the lawful guardian of a minor alienates his estate for an antecedent debt or to pay up a previous decree passed against the estate, a case of legal necessity is made out which debars the minor from recovering his estate or interest. In an early Privy Council case<sup>3</sup> the minor's father, as his lawful guardian sold his estate for valuable consideration and for legal necessity. A suit was instituted to annul the sale by an assignee some 10 years after the minor had attained his majority. The claim was dismissed up to the Privy Council on its merits. But such a claim is not

1. *Narendra v. Rai Charan*, 29 Cal., 647 *Annapaganda v. Keru*, 26 Bom 221 (F.B.)

2. *Gurupershad v. Gossie Manraj*, 11 Cal., 733, has been overruled by *Asirum v. Sharif*, 17 Cal., 488, F.B.

3. *Musstt Humeeda v. Musstt Amatool*, 17 W R., 106 (P.C.)

tenable by reason of article 44 of the old and the present Limitation Acts; but as the Privy Council case was decided in 1874 the question of limitation was not discussed in the decision. On the same principle,

a Division Bench<sup>1</sup> of Calcutta dismissed a claim set up in the interest of the minor by his mother against a valid transaction entered into by the minor's father which entailed an alienation of the ancestral property in which the minor was interested. Such suits are very common: and in the generality of instances they are prompted by the father himself or any other guardian who remains behind the screen. In the case of a father whether he be dealing with

Delay of suit, antecedent debt, legal necessity, minor's estate.

Alienation by father: legal necessity *versus* pious obligation. Nature of relief.

his minor son's estate as his guardian, or ancestral estate in which his minor son has vested interest, the question is if there be no proof of legal necessity or family benefit to justify the transaction of alienation effected by the father, what remedy has the son got to recover the estate avoiding the alienation. It may be said that the early ruling<sup>2</sup> of Calcutta on the subject which laid down that the price obtained by the father must be regarded as assets held by the family, has been dissented from by a later Full Bench case.<sup>3</sup>

The eminent Judges of the Calcutta High Court who constituted the Full Bench in the latter case quoted above, and who answered a very important point of reference made by Glover, J., have laid down a principle of law which, to quote the language of Mitter, J., has been virtually overruled<sup>4</sup> by the Privy Council. The view of law propounded by the Full Bench is hardly tenable now,—that a son is entitled to recover from a purchaser from his father, ancestral property improperly sold by the latter; and that in absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, he would be entitled to recover without refunding any part of the purchase-money. With Mr. Justice Mitter and the

Father or any other guardian, minor's estate or share. Personal need not amounting to legal necessity.

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1. *Hardai v. Haruck*, 12 C. L. R., 104.

2. *Muddun v. Ram Buksh*, 6 W. R., 71.

3. *Modhoo Dyal v. Kolbur Singh*, 9 W. R., 511 (F. B.)

4. *Koer Hasmat v. Sundar*, 51 Cal., 396; *Girdharilal v. Kantoolal*, L. R. 1 I. A., 321.



Privy Council case cited above, on my side, I have not the slightest hesitation to consider that the Full Bench decision is wrong, and that the view of law stated in 6 W. R. 71 is the correct Hindu Law. The price for the alienation by the father forms the moral, if not the actual, assets in the hands of the son, which he is bound to account for, and to repay, if he is at all entitled to recover his property or his share therein. Mr. Mayne in the seventh Edition of his *Hindu Law and Usage*, page 486, has adopted the thought and the wording of the Full Bench case as his own. To that extent the view therein expressed is erroneous. In the next page the learned author has given the right view of the matter citing later decisions of Courts. It is regrettable that we do not find any discussion of the aforesaid Full Bench case in the Third Edition of G. Sastri's *Hindu Law*. But with all the authority before us, we are in a position to assert, that unless the price for the alienation received by the father-guardian be shown to be connected with illegal or immoral purposes, and independently of any question of legal necessity or benefit to the family, the son is not, if at all, entitled to recover his property or his share without the equitable refund of the price received by his father. But the case is different when over the minor's estate or his interest any other coparcener or guardian is the manager. In that case only, the view laid down in the Full Bench case, 9 W. R. 511 (F. B.), is undoubtedly correct. But in either of the two aforesaid contingencies, it is the estate or the share of the minor which is in question before the Court. Consequently, it is always open to the purchaser, whether as a plaintiff or as a defendant, to contest that on the equitable view of the case as to refunds etc. on its merits, he is entitled to retain the property as a whole on the allotment of shares on partition,<sup>1</sup> which would be necessarily induced by claim in respect of the interest or the share of the alienating guardian of the minor. It should be remembered, as I have discussed in a previous chapter, that it is in the power of the alienee to insist that whatever may be the nature of the consideration for the alienation, the alienor's interest cannot, as a matter of right, be reclaimed even on terms of a refund. Barring the aforesaid exception to the analysis of Mr. Mayne noted

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1. *Koer Hasmat v. Sunder*, 11 Cal., 396.

above, the other conclusions of the learned author are in full accord with the deductions I have made above.\*

In the Calcutta case, cited above, reported in I. L. R. 11 Cal. 396, the point of legal necessity of the consideration for the sale by the father-guardian failed by reason of the inexplicable discre-

pancy between the pleading and the proof for the object of the debt contracted by the father. Hence the alienation was treated as if it were the sale of the property for the father's personal need untainted with immorality. On the subject of the alienation by the father of his son's interest in ancestral property, the conflict of the views of courts dates from a very early time: and it is a matter of great surprise that the celebrated Privy Council decision of *Girdharilal's* case has been and is still being quoted as an authority for diametrically opposite views. To show this I quote *Bheknaram v. Januk*, I. L. R. 2 Cal., 438, (A. C.), and *contra* the case of *Gunga v. Sheo Dyal*, 5 C. I. R. 224. It is needless to notice and to pass through the mazes and the labyrinths of the numerous case-law in this respect by reference to the current indices of cases with their numerous followings and dissents; because the task would be interminable till we reach the recent number of the Allahabad series, passed in 1909. The Full Court of Allahabad did not leave a single case (Indian or of the Privy Council) unnoticed. They could find isolated passages in the scattered pages of the rulings which seemed to place the father, whether as the guardian of the minor sons or as the *Kurta* of the family, on the same level as an ordinary coparcener. As has been said in an earlier chapter I prefer to adhere to the opinion of the minority of the Full Bench case, because it coincides with the view of the rest of the Indian Courts.

Much authority is not needed for the proposition that a minor cannot be made personally liable for contracts or obligations for legal necessity or for family benefit made by his guardian. We have it in *Hanumanprasad Pande's* case that the omission of the minor's name in the deed, in the context or as a signing party through the guardian, is a matter of informality which does not affect the main question involved in the case to render the minor's estate liable

under circumstances of necessity and honest belief indicated in the judgment of the Privy Council. But on the other hand, the most careful drafting of the deed and the prominent insertion of the minor's name, and signature in the instrument will not help the cause of saddling liability on the minor or his estate, if legally or equitably, the engagement is not beneficial to the minor. Nay further, in the leading Privy Council decision of *Waghela's case*,<sup>1</sup> the conveyance of landed estates, which was supported by strong legal necessity, viz. to discharge the ancestral debt of the minor, which was executed by his widow mother as guardian, contained a distinct covenant in the name of the guardian as well as of the minor to indemnify the vendee for future losses and expenses connected with the properties sold. Regarding the legal necessity for the sales themselves, the question had in a previous suit been finally decided in appeal in the High Court of Bombay in favour of the vendee in a suit brought by the minor for the purpose. In spite of that, their Lordships of the Privy Council set right the decisions of the Courts below and ruled that the liability for such a personal covenant could not be imposed on the minor or his estate. The said covenant was to reimburse the vendee for all losses by way of Government revenue and cesses, the freedom from which was declared in the deeds. The claim in the case was formally complete, but the claim stood dismissed in the result. In another case,<sup>2</sup> their Lordships laid great stress on the formality of the case and of the pleadings in a claim against the minor for *ijara* rent of three years prior to his attaining majority. The *ijara* had been taken by the defendant's mother and grandmother, acting as his guardians for the time being. The said *ijara* was in continuation of a long-term old *ijara* which had been continued from the time of his deceased adoptive father and renewed for the last three years by the said guardians for his benefit. The defendant was an adopted son and the guardians managed his estate under the provisions of a will.

1. *Waghela v. Shekh Masludin*, 11 Bom., 551 (P. C.) See also *Ram Chunder v. Dwarkanath*, 16 Cal., 330.

2. *Indur Chunder v. Radhakisore*, 19 Cal., 507 (P. C.)

Beneficial engagement  
binds minor's estate,  
P. C. view discussed.

Relying on the power conferred by the will, and finding on the facts and evidence that the *ijara* in suit was beneficial to the minor,<sup>1</sup> and honestly believed to be so by the parties concerned, the First Court granted a decree against the *quondam* minor. The High Court on appeal set aside the personal decree against the defendant and dismissed the claim on the ground that the plaintiff could not, in a suit for bare rent, fall back at a late stage of the case upon the authority of the ladies to bind the minor's estate by a transaction apparently undertaken by themselves. This decision was confirmed by the Privy Council on the sole ground that the original pleadings did not seek to make the minor's estate liable by the terms of his adoptive father's will. With all humility, I venture to remark that this is rather a technical subtlety. The proceedings showed that the will was relied upon by the plaintiff, and that the High Court in appeal did not cancel the findings as to the beneficial nature of the *ijara* transaction. It could not probably be denied by the defendant that the rents had been realized from the sub-tenants during the *ijara* period in suit. It is not, therefore, quite intelligible how equitably the defendant could claim absolute freedom from liability. It is a common occurrence in this country that pleadings are not very precise and apposite: while it is absolutely impossible to deny that the claim for money-decree includes the claim for decree on the assets. The High Court of Madras<sup>2</sup> has made a halting attempt to distinguish the Privy Council case cited above by remarking that though it is in the power of the guardian to renew an obligation of necessary debt by a bond executed in the name of the minor, the guardian is incapable to create a new obligation, if there were no pre-existing debt to justify the transaction.

In a case decided by the Judicial Commissioner at Nagpur,<sup>3</sup> the learned Court found that there was no evidence, and hence no decision as to whether the debt contracted by the guardian was for the benefit of the minor. This, I submit, was sufficient for the dis-

1. Compare *Sinaya v. Munisami*, 22 Mad., 289.

2. *Subramania v. Arumuga*, 26 Mad., 330 (331).

3. *Rama v. Huri*, 2 C. P. L. R., 60.

Benefit without legal necessity for the minor. posal of the case in Second Appeal. The L. A. Court had passed a decree in plaintiff's favour. The report of the case shows that a considerable portion of the debt had been borrowed by the minor's guardian for a successful litigation which benefitted the minor. A large part of the remaining debt was for grain and bullocks which, the learned Judicial Commissioner was prepared to admit, was also for the minor's benefit. But the decree was reversed on the ground that legal necessity for the beneficial results of these loans was not established. It is not clear from the report how the litigation, cattle, and grain were not necessary in the interests of the minor. Without an express finding in this respect, I cannot help remarking that the ruling involves a curious paradox. In a later<sup>1</sup> ruling the same learned Judge was not able to distinguish the legal necessity of a transaction from its beneficial character in the interests of the minor. Finding with the Court below, that there was no pressing demand for debts on the minor's property, and finding also that there was no kind of direct need to sell the village, the sale was set aside without any equitable compensation to the purchaser for the improvements alleged to have been effected in the village, because it was held that more than the value of the said improvements had been realized from the usufruct of fifteen years that the purchaser had been in possession of the village.

No compensation for improvements.

I have, in several places, pointed out that the existence of a debt or demand is *per se* not legal necessity. It is the pressure, inevitable for the time being, which determines the question. In a decision of Bombay,<sup>2</sup> Sergeant, C. J., reversed the concurrent decrees of the Courts below, and held that the sale of land by the mother-widow of a Muhammedan minor was a nullity. The mother effected the sale of the property of her deceased husband as the guardian of her minor son and also on her own behalf. The sale was to discharge the mortgage-debt over the property which had been incurred by her deceased husband. This fact induced the Courts below to decree possession in favour of the purchaser, regardless of the

Legal necessity—actual pressing need.

1. Birdhichand v. Mt. Marian Bi, 3 C. P. L. R., 86.

2. Baba v. Shivappa, 20 Bom., 199.

technical flaw that a Mahomedan mother was not a recognised guardian under the *Koran*. The decree was attempted to be supported, first on the mandatory injunctions of the Mahomedan Law as to the repayment of ancestral debts in the first instance, and secondly, on the ground that the discharge of the debt had become a matter of pressing legal necessity.

Mahomedan mother a legal guardian in cases of legal necessity.

The second contention, apparently, was not a part of the plaintiff's case in the Courts below, because he relied on the validity of the sale for the sole reason that the ancestral debt had been discharged by the lawful and proper custodian of the estate. But the remarks of the learned Chief Justice are significant in this respect :—"but here the sale was in discharge of debts which had not been adjudged ; nor have any special circumstances been found by the Courts below such as led the Allahabad High Court, whether rightly or wrongly, in *Hasanali v. Medhi Hussain*, I. L. R., 1 All , 553, to give effect to the sale by the mother." Indeed the pressure of execution sale for the debt due by the deceased husband of a Mahomedan lady gave rise to a legal necessity which justified the auction sale of the deceased's estate including the vested inheritances of her minor daughters, albeit the latter were not parties to the suit. At page 345 of the report, Ranade, J. has made a careful analysis of the case-law on the subject of legal obligations to discharge the ancestral debts of the Hindus as well as of the Mahomedans. On the occurrence, therefore, of the pressure to meet the demands for such debts, the technical rules of Hindu or of Mahomedan Law as regards the competency or otherwise of the mother acting as the guardian will not, it is apprehended, vitiate the alienation effected by her. We have instances<sup>1</sup> of other relations posing as the minor's guardians to challenge improper alienations effected by the minor's father. In the case cited, the minor's uncle was his next friend to impeach which he successfully did, the gift of joint property effected by the minor's father. In the two recent converse cases<sup>2</sup> of Calcutta and Madras, the alienations made by the Mahomedan mother

1. *Davalava v. Bhimaji*, 20 Bom., 338.

2. *Ramanna v. Venkata*, 11 Mad., 246.

3. *Moyna v. Banku*, 29 Cal., 473. *Pathummabi v. Vittil*, 26 Mad., 434.

were directly in issue. The point of legal necessity of the transactions was not a specific matter of defence or attack. The resultant benefit to the minor by the discharge of his father's debts was an incidental side-issue raised in equity. Restitutions in the shape of equitable refunds were made in these cases; whereas in the Allahabad case<sup>1</sup> the unauthorised guardian-uncle was held incompetent to impose a new obligation in the shape of rent on his minor nephew for property which had been wrongly mortgaged by him to the plaintiff.

Bearing in mind the well-considered judgment<sup>2</sup> of the Bombay High Court referred to in the previous Chapter and the long series of rulings from which the analogous principles of Joint Families of the Hindu and Mahomedan Law were deduced by the learned Judges we see at times most startling rulings of Courts which casting aside all equitable considerations lay too much stress on the bare technicalities of the text-law. Take for instance a recent Madras case.<sup>3</sup> In that case, the two surviving brothers of a Joint Mahomedan family trading in partnership borrowed under a bond a sum of money admittedly for the purpose of the trading business. The debt was incurred after the death of one brother whose widow married one of the surviving brothers. The deceased had four minor sons. The creditor brought an action to recover his debt from the debtors as well as from the family property which under the Muhammedan Law belonged in severalty to the three brothers. After the death of the minor's father his interest descended in severalty to his widow and to his minor sons. The business was not wound up on the technical dissolution of the firm by the death of one brother. It continued, as in the case of every trading business of Joint Families in India, as if under a reconstituted partnership formed among the survivors. Under ordinary circumstances for such business the surviving members act as the *de facto* and accredited managers in the interest of the whole family. In the Madras case cited above the creditor's claim was decreed as asked, against all the members and their partnership estate. The

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1. *Nizam v. Anandi*, 18 All., 373.

2. *Davalava v. Bhimaji*, 20 Bom., 338.

3. *Abdal Khader v. Chidambaram*, 32 Mad., 276.

Subordinate Judge overruled the minor's contention that their uncles were not their guardians under the Muhammedan Law, and that the estate of their father which they held in severalty was not liable for the debt in suit. Both these contentions however prevailed

Hindu and Muhammedan guardians for necessary debts contrasted.

in the High Court on the sole basis of technical texts of Muhammedan Law of vested inheritance and of guardianship. The Judges held that the uncles though really in charge of the continuing partnership business, were bare intermeddors of the interests of the minors and that the obligation incurred by them, though not held to be for any other than the family business in their charge, created no sort of liability on the estate of the minors.—Reading this case side by side with the Bombay decision noted above, I would be surprised if the reader could find where the truth lay. Most, if not all, of the arguments adopted in the Madras case are applicable to the Hindu families under the Dayabhaga School. Of course under the Hindu Law the uncles would be recognised as the *de facto* guardians of the minors. The uncles in the Madras case could not certainly be treated in that way. But in the Bombay case, the foreclosure decree was obtained against the mother, and the minor son was impleaded in the action, obviously under his mother as his guardian-*ad-litem*. The daughters were not impleaded in the suit: and yet it was held on the equitable principles of legal necessity equally governing the affairs of Hindu and of Muhammedan families that the daughters were not entitled to redeem their father's mortgage. But the mother in the Bombay case was not the legal guardian of her children. In that view of the matter it is impossible to follow the decision of the Madras Court on grounds of equity clearly set forth in the Bombay case cited above.<sup>1</sup>

On a purely technical point of view, the correctness of the Madras decision cannot of course be doubted. There are indeed decisions of other High Courts which, on the question of unauthorized guardianship of minors have followed the same view by annulling the transactions in the interests of minors. But the

1. Compare also *Abdul Bari v. Rash Behari*, 6 C. L. R., 413.



authorities collected in a Calcutta case<sup>1</sup> have taken a more rational and discriminating view by carefully discussing the nature of the transaction on grounds of equity, justice and good conscience. Such discussion of the facts of the case cannot be found in the recent Madras decision under notice. On the other hand we find that the learned Judges have gone the length of stating, as an *obiter*, that even if the transactions were *bona fide* and for the minor's benefit, a person not a guardian at law cannot bind the minor. There is no doubt considerable conflict in the case-law on this subject. But we prefer to cling to the side of those decisions, which uphold the transactions of *de facto* guardians, that are supported on grounds of legal necessity and manifest benefit to the minors. This; at all events, assimilates the law on the subject as applicable equally to the Hindus and Mahomedans.

The case perhaps of volunteer guardians of minors or of other incapable persons may stand on a different footing. Management of the property of such persons *ex mero motu* does not necessarily cast an express or implied obligation on the estate to return the benefits which may be rendered on account of beneficent or voluntary purposes. On this subject, the remarks

of their Lordships of the Privy Council are pertinent and deserve quotation :—"But even

if this were true it is not in every case in which a man has benefitted by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid. (*Stokes v. Lewis*<sup>2</sup> *Term Reports* page 20). Nor can the case of A be better because he made the payment not *ex mero motu*, but in the course of a transaction which,

1. *Mufazzal v. Basid*, 34 Cal., 36.

2. *Ram Tuhul v. Biswaswar*, 23 W. R., 305 at p. 308.

in one event would have turned out highly profitable to himself and extremely detrimental to the person whose debts the money went to pay." It is in rare instances, however, that we notice a volunteer figuring in the transactions connected with the estate of a minor incurring personal responsibility conjointly with the estate he intermeddles.

It is within the scope of the present Chapter to indicate that the entire circle of benefactors does not lie within the limits of close blood relationship. There are many outside the pale of the natural family who are competent to impose obligations of legal necessities, as onerous and unavoidable, as those discussed in the previous Chapters. To illustrate my meaning, I proceed to quote a few ancient texts of Hindu Law and the remarks of some of the leading commentators.

Manu, Chapter VIII, on Judicature, *verse 166* :—

Texts of obligations  
on the assets.

"If the debtor be dead, and if the money borrowed was expended for the use of his family, it must be paid by the family, divided or undivided out of their own estate."

• *Verse 167* :—"Should even a slave make a contract, *in the name of his absent master*, for the behoof of the family, that master whether in his own country or abroad, shall not rescind it."

These principles of substantive Hindu Law in the original texts are not as such in force. Because they have been replaced by the British Legislature on wider and broader bases. Mr. Mayne in his "Hindu Law and Usage," 7th Edition, para 333 says :—"All the members of the family, and therefore all their property, divided or undivided, will be liable for debts which have been contracted on behalf of the family by one who was authorised to contract them. The most common case is that of debts created by the manager of the family. He is, *ex officio*, the accredited agent of the family, and authorised to bind them even when minors, for all proper and necessary purposes, within the scope of his agency. \* \* \* 'The householder is liable for whatever has been spent for the benefit of the family by the pupil, apprentice, slave, wife, agent, or commissioned servant.' Of course this implies that the persons referred to have acted either with an express authority,

or under circumstances of such pressing necessity that an authority may be implied." We have it in *Narada*, Chap. iii that "debts contracted by the wife never fall upon the husband, unless they were contracted at a time of distress, for the household expenses have to be defrayed by the man."

In spite of the aforesaid texts, it is a settled view of law that an express or implied agency is necessary to saddle personal obligation on the non-contracting party. In an Allahabad Case,<sup>1</sup> the loans contracted by the wife were found not to have been sanctioned directly or indirectly by the husband. In such cases, the onus is on the creditor to prove the authority or even implied permission or show such an emergency as to give rise to the presumption of permission. The same remarks would, it seems to me, be applicable to the obligations incurred by servants of masters. The case of infants or other incapable persons stands on a different footing. To start with, such a person cannot enter into a binding engagement. A contract for him is made by an adult as his next friend or guardian. The question of personal liability might perhaps arise against a *quondam* minor after his attaining majority. If a necessary debt is incurred

Criterion for personal liability on contracts by fiduciary relations.

for the minor's benefit<sup>2</sup> the liability of his assets for such debts is a matter of no doubt.

No personal decree against the minor is ordinarily valid or legal. But the question may arise whether a personal decree against him could be passed on foot of subsequent ratification or acceptance. On this subject Simpson in his "Law of Infants" (page 65) remarks that "there must be some act on the part of the infant, after majority, which recognizes it as valid and binding."

Mr. Hugh Fraser in his lectures delivered at the Council of Legal Education, Michaelmas Term 1903, delivered the following interesting and instructive notes on the points now under consideration. "Section 2 of the Sale of Goods Act, 1890 provides that where necessities are sold *and delivered* to an infant or to a person who by reason of mental incapacity is incompetent to

1. *Girdhari Lall v. W. Crawford*, 9 All., 147.

2. *Watkins v. Dhunno Babu*, 7 Cal., 140.

contract he must pay a reasonable price therefor.' The obligation to pay for the goods incurred by the person under incapacity does not arise unless the contract be executed (1) by a transfer of property as in all cases, and (2) by delivery. (I) A lunatic:—generally a contract made with an insane person *known to be insane* cannot be enforced against him : but his estate is liable for *necessaries supplied* to it. *In re Rhodes* 1890, 44 ch. D. p. 94, & *The Imperial Loan Co. v. Stone*, 1892, 1 Q. B. p. 599. (II) The drunken man:—A contract made by a drunken man known to be drunk is generally voidable. But the creditor might recover against him when sober *the necessaries supplied* to him when drunk—Chief Baron Palmer in *Gore v. Gibson* 1845, 13 M. & W. page 625. (III) The infant:—By Section 1 of the "Infants" Relief Act 1874 all contracts for goods *supplied* other than contracts for necessaries and all accounts stated with infants shall be absolutely void. (IV) Married Woman:—Similar provisions in the M. W. P. Act 1882 & the M. W. P. Act 1893."

The above cited Indian texts and English authorities afford a valuable clue for the interpretation and applications of Sections 68, 69, and 70 of the Indian Contract Act, (IX of 1872). Commentaries on the said Act contain numerous Indian cases, which I refrain from quoting, that go to show the circumstances under which decrees for the recovery of money can be passed against the person or the property of the parties benefitted by the transactions. It cannot be said that the provisions of Section 70 of the Contract Act cannot be applicable to the cases of incapable persons in order to render them liable personally "to make compensation in respects of, or to restore, the thing so done or delivered," though in the majority of cases it would appear to be more expedient to direct that the property of such persons should be liable.

Leaving the consideration in detail of what may be regarded as the necessary supplies within the meaning of section 68 of the Contract Act, it is desirable, briefly, to refer to one important item which concerns landed estates in this country. Payment of Government revenue by a cosharer to save the estate is an important matter which involves the question of legal necessities and obligations among the cosharers. The question, whether for such

Government revenue  
a charge on the estate  
saved.

necessary payment of Government revenue, a charge or lien over the estate that has been saved, is created, has been variously answered by our Courts.<sup>1</sup> There prevails considerable discrepancy of views in the decisions of our Courts in India on the priority of salvage liens over properties. The English rulings, on which the decisions of Indian cases more or less depend, are clouded with subtleties, which I do not consider necessary to discuss. But the better and the more predominating opinion now seems to be, that the lien does exist, and it has, since the decisions of the aforesaid Full Bench cases, been recognized in the more recent decisions<sup>2</sup> of High Courts. This doctrine was attempted to be extended to the case of the widow's estate saved by the payment of Government revenue<sup>3</sup> by another cosharer. But as the decree in the Allahabad case just cited was in its inception a decree against the assets of the deceased Hindu widow, the creditor was not allowed to attach the landed interest of the widow's husband inherited by the reversioner. Had the learned Judge, Justice Blennerhasset, confined his *ratio decidendi* to the restricted wording of the decree, his remarks that "hard cases make bad law" would have been more apposite. It was indeed the original decree in execution that made it a bad case. But the Lambardar's real case was by no means hard, inasmuch as it fell within the four corners of the equitable principle stated in Section 69 of the Contract Act (IX of 1872). But for reason of the decree itself, the decision of the Allahabad Court<sup>4</sup> must be held to be correct, though the *obiter* of the learned Judge trying to support the decree was uncalled for, and bad in law. The same mistake, it appears to me, was repeated by another Division Bench of the same High Court in the next year. I am surprised to see that while Mr. Mayne in the Seventh Edition of his learned work on Hindu Law and Usage makes no reference to the Allahabad case reported in the 8th Volume; he classifies with

1. Seth Chitarmal v. Shib Lal, 14 All., 273 (F.B.) Kinuram v. Mozaffer, 14 Cal., 809 (F.B.)

2. See Dr Ghosh's Law of Mortgage, 4th Edition, on Salvage-liens.

3. Shjamanand v. Harlal, 18 All., 471.

4. Dhiraj v. Mangaram, 19 All., 300.

apparent approval, the consensus<sup>1</sup> of the views of three High Courts (Allahabad, Bombay and Madras,) in support of the theory that a debt of legal necessity incurred or caused by a Hindu lady in possession of the estate of a deceased male owner, does not follow the estate in the hands of the reversioner. The case<sup>2</sup> of *Ichamoyi*, I. L. R., 6 Calcutta, 36 should not have perplexed the learned author; because we find the later decisions of almost all High Courts of India have recognized the validity of the debts of legal necessity on the estates of inheritance acquired by the reversioners. These have been noticed by Babu G. C Shastri in his 3rd Edition of *Hindu Law*, page 406. These are noted below.<sup>3</sup> These opinions of the Full Bench cases are mainly based on the principle that the estates represented by the ladies were benefitted by the loans, though undoubtedly the obligations incurred by them were personal in their character.

Under the provisions of the Transfer of Property Act (IV of 1882) the rights and the liabilities of the mortgagee and the lessee in possession have been discussed and serially described in their respective chapters. I refrain from reproducing the sections in this place. But we must remember a chief distinctive feature between the rights of a mortgagee in possession and those of a lessee in possession in reference to the charges and expenditures incurred under the pressure of legal necessity. In the case of a mortgagee they constitute a part of the mortgage-money with all the advantages and securities of the mortgage concerned, whereas the lessee has got barely a money claim under the rules of secs. 69 and 70 of the Contract Act. *Smith v. Denonath* I. L. R., 12 Cal., 213 in a case under a lease. We need hardly say that the question of limitation to enforce the rights under these adventitious claims for money is entirely dependant upon the fact whether by law a particular charge or payment creates a barely personal obligation or a lien as well.

1. *Gadgeppa v Appaji*, 3 Bom., 237. *Ramasami v Sellattammal*, 4 Mad., 375 *Dhiraj v. Manga Ram*, 19 All., 300.

2. See Mayne, *Hindu Law and Usage*, 7th Edition, p. 636.

3. *Hurromohun Roy's case*, 10 Cal., 823 (F.B.), *Sakrabhai v. Magan Lal*, 26 Bom., 206 (F. B.)

If a mortgagee, not in possession, advances money for the payment of Government revenue to save the estate from sale, or incurs other expenses to save, secure, or maintain his security, he merely acquires a money claim for his advances against the mortgagor. This appears to be the tendency of the decisions, cited above, which sometimes are quoted in support of opposite views : compare *Kamaya v. Devapa*, I. L. R. 23 Bom., 440 (p. 445). Farran, C. J., thus observes with reference to the case —“ The authority cited by the District Judge—*Nugender Chunder v. Sreemutty Kaminee*, when carefully read, does not bear out the proposition for which the District Judge has cited it. It is usually referred to as an authority for the opposite view. The actual decision turned on the question of pleading. The representative of the mortgagee paid the arrears of the Government revenue to save the mortgaged estate from sale, while it was in the possession of the widow of the mortgagor. He then brought a suit against the widow which did not raise any claim against the estate, but sought only a personal decree against her. This he obtained ; but finding that he could not execute it against the estate, he filed a supplemental suit against the widow and the reversioner, praying that the amount of original decree might be realised by selling the estate. The Privy Council affirming the judgment of the High Court held that the decree, which the plaintiff had obtained, could only be enforced against the widow's interest in the estate of her husband. The Judicial Committee, however, intimated their opinion (p. 267 of the Report) that the plaintiff in a properly constituted suit would have been entitled to have had an additional charge on the estate declared in his favour by reason of his having saved the estate by payment of the Government revenue. In *Shaikh Idrus v. Vithal Rakhmaji*, P. J. 1879, p. 407 Westropp, C. J. and Melvill, J. allowed a mortgagee in possession who had paid the Government assessment from his own funds, a lien on the estate for the amount. That case is on all fours with the present.”<sup>1</sup>

Sometimes necessary loans are advanced to minors with the knowledge of their minority. A minor, for instance, may be sufficiently advanced in age and he may appear to be discreet enough to appreciate

1. Compare also *Girdhor Lal v. Bhola Nath*, 10 All., 611.

his own interests. In a Calcutta case,<sup>1</sup> a heavy amount was borrowed by a minor known to be so to the creditor, to

Loan to minor, legal  
necessity, equitable  
relief.

enable the former to defend himself on a criminal charge of dacoity pending against him and others, who conjointly with the minor executed the bond in plaintiff's favour. The bond was registered, and was the basis of a suit against all the executants; the contention of the minor defendant went as far as the High Court, and it was based on the ground that the deed was void as against him, that its registration was unavailing, and that the claim apart from the deed was barred by time. The necessity for the loan was also impugned by the minor. The last point was, as a matter of fact, found against him throughout. But it was not precisely stated to what extent the loan was utilized by the minor himself for his own defence. A joint decree was, however, passed against all the defendants, probably on the ground that the splitting of the claim severally against the defendants was not considered judicious or convenient under the circumstances of the case, as it was a matter that was capable of adjustment in a contribution suit among the defendants *inter se*. But with respect to the claim, *based on the bond*, the High Court reversed the decision of the District Judge, who relying on a current of rulings then in force and interpreting the law as regards the incompetency of the minor to contract considered the bond, sued upon, to be void *ab initio*, and not voidable only. The Judge did not, however, hesitate to find that the minor secured his release with the use of the money he borrowed. The High Court, on appeal, reversed this decision, and held that the bond in suit coupled with the fact that the loan was necessary and beneficial to the minor, offered to the plaintiff a complete cause of action to recover his money from all the defendants. An early ruling<sup>2</sup> of Calcutta was referred to, and followed. The claim was held to be within time, as the bond was registered, though the necessary supply for the loan had taken place more than five years before the suit. The registration of the deed was assailed on the ground that the executant boy and the executee conjointly duped the registering officer into the belief that the executant was a competent person within the meaning

1. Sham Charan Mall v. Chowdhry Debia, 21 Cal. 872.

2. Watkins v. Dhunnoo Babu, 7 Cal. 140.



of section 35 of Act III of 1877. The learned Judges of the High Court of Calcutta held that this circumstance did not vitiate the registration. Apart from the very bold position thus assumed that a direct deceit practised on the officer did not vitiate his action in favour of the deceiving parties, it is a matter of considerable doubt whether in view of the Privy Council decision<sup>1</sup> now passed, the minor's bond could at all be made the basis of a suit. The bond being wholly void the only ground to fall back upon to found the claim against the minor or the estate is the equity enunciated in sections 68 and 70 of the Contract Act. But for that purpose the claim against the minor was barred by limitation. It will be seen that in the Privy Council case noticed above, their Lordships rescinded the contract executed by the minor, and did not feel themselves called upon to render any equitable relief in favour of the obligee, the defendant. I can only explain this by stating that it was the opinion of the Privy Council that sections 64 and 65 of the Contract Act were not applicable to the case, as those sections applied to the cases of persons competent to contract. It was further held by their Lordships that the defendant did not, in his original pleadings and proof, make out a sufficient case for an equitable relief that could be granted under section 41 of the Specific Relief Act (I of 1877).

Necessary pleadings and proof for equitable relief.

This is a very important point for the consideration of the Courts in our country. The whole attitude of the defendant in the case was such as to debar him from seeking mercy on the side of equity. He pleaded estoppel against the plaintiff and concentrated all his efforts to saddle personal responsibility on him. On this subject their Lordships observe at p. 549 :—"These sections no doubt do give a discretion to the Court, but the Court of First Instance and subsequently the Appellate Court, in the exercise of such discretion came to the conclusion that under the circumstances of this case, justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised." It is precisely on these grounds that the plaintiff in a Madras decision<sup>2</sup> was not allowed, in a case, which was

1. *Mohori Bibee v. Dharmodas*, 30 Cal. 539 (P.C.)

2. *Venkata v. Timmayya*, 22 Mad. 314.

otherwise very fit and proper, to obtain the equitable relief for the refund of his money. "But in the Lower Court", says Subramania Aiyar, J., "section 68 on which stress is now laid, not having been relied on, no allegation to the said effect was made and no issue framed on the point. The appellant cannot be allowed, at this stage, to raise such an issue, as it would necessitate further inquiry."

On the subject of claims for refund of money and for compensation for benefits done, it is necessary to remember that the Indian law, as embodied in section 70 of the Contract Act, is very much less generous than the law of England. It would appear that in this country a man can demand the sordid return of money, being the price of water, for saving his neighbour's house from fire.—(See illustration b of section 70 of the Contract Act); because A need only plead, "I never intended to supply the water *gratis* for saving B's store of grain and clothes." Thus he can demand the trial of the issue as to his intention and claim reimbursement. Thus we find some Indian

cases in which claims for compensation were  
 Gratuitous action, on compensation for benefit. decreed on the sole ground that the acts were

lawfully done not in a spirit of generosity, but with the intention of being repaid to the extent<sup>1</sup> of advantages rendered. In both these cases the learned Judges have after carefully comparing and contrasting the English Law on the subject held that the claims put forward would have failed in England; but that they were bound to succeed under the more catholic and wider provision<sup>2</sup> of section 70 of the Contract Act. Should I say more catholic or less generous? Whatever that be, the plaintiffs in both the aforesaid cases succeeded to recover the values of the proportionate benefits which they conferred upon the defendants by effecting certain necessary improvements to the common properties of the parties. The principle of the English Law on the subject is based upon the broader view that past consideration is no consideration at all. No promise for return can either expressly or impliedly be deduced therefrom and it cannot be the basis for a claim for money. A promise thus made would be laid at the door of generosity. It would be regarded as an officious courtesy and altogether naked to imply an obligation to repay

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1. Damodara v. Secretary of State for India, 18 Mad., 88. Jarao Kumari v. Basanta, 32 Cal., 374.

money. The remarks of Sir William Anson in his *Law of Contracts*, 9th Edition, 1899, pp 101-102 contain a clear elucidation of the English law on the subject with citations of authorities upto a recent date. I do not quote the English cases here. It is barely sufficient for me to state that, in accordance with the 'views expressed in the decisions quoted above, the law of England is no guide for us to decide the questions of obligations arising out of nongratuitous beneficial acts done or rendered in this country. But at the same time there are cases<sup>1</sup> in which the claimants are perfect strangers to the transaction, and having no interest in the matter were not allowed to recover their money for gratuitous payments which they were not required to make. In some of these cases the very title or right on foot of which the plaintiffs redeemed the mortgages of other persons was found wanting. It mattered not that the defendants were benefitted in a way at the cost of the plaintiffs. Here the defendants had no option to receive the benefits.<sup>2</sup> These are cases of absolute volunteers whose actions were not "lawful" within the restricted meaning of that term as interpreted by Straight, J. and Mr. Stanley Ismay in the Allahabad and C. P. cases cited above. As explained by these learned Judges no one can be said to do an act lawfully unless his relation or interest is such that he has a sort of express or implied authority to do that act and to intend not to do it gratuitously. If we discard this narrow meaning of the term, I mean made narrow to justify the existence of section 70 in the Statute-book, any reckless volunteer may, I apprehend, safely contend that his action being not prohibited by law, was lawful in its character.

In order to claim recoupment it is very necessary that the plaintiff should set forth his claim alleging facts to lay the foundations for the equitable relief. If he avers that his adverse party has derived the benefit of his payment, it is his duty to adduce evidence in that respect. He would then make out a *prima facie* case for presumptions in his favour that he did not pay gratuitously, and that he intended or honestly believed that he would be repaid. Evidence in these two respects

Volunteer or not, a question of fact, necessary pleading and proof.

1. *Shriram v. Harbaji*, 12 C. P. L. R., 4. *Damodar v. Secretary of State for India*, 18 Mad., 88. *Janki Prasad v. Baldeo Prasad*, 30 All., 167.

2. *Chhedil Lal v. Bhagwandas*, 11 All., 234. *Ram Tuhul Singh v. Biseswar*, 2 I. A., 131.

also would complete the plaintiff's case and pave the way for the introduction of section 70 of the Contract Act. In that view of the matter, it seems to me, that the decree in the income-tax case decided in Madras<sup>1</sup> in 1907 would have been maintained by the High Court if the plaintiff had pleaded and adduced evidence to the effect that the defendant had enjoyed the income of the year for which the plaintiff paid the tax to the Collector. The bare fact that there was a legacy in favour of the defendant in respect of the dealings that were taxed for income is not, it is apprehended, sufficient to bring the benefit home against the defendant. The prospective chance of future benefit affords no cause of action for a claim under section 70. This, it appears to me, was the mistake committed by the Lower Courts in passing a decree. Apparently the plaintiff in the case contented herself by pleading that by reason of her husband's will the dealings devolved

Benefit, actual, not prospective, essential for liability.

on the defendant. But such devolution was not *per se* tantamount to the actual receipt of income from the dealings. Had there been a distinct averment in the plaint that the income had been actually received by the defendants, and the question had been left untried by the Courts below, it could not be doubted that the case would have been a fit case for remand.

It is unfortunate that the reversal of the concurrent findings of fact of the Courts below, involving the dismissal of the plaintiff's claim, should have been done in such brief and summary a style as the *aforecited* Madras decision shows. It is no doubt true that the finding as regards the benefit derived by the defendant, by the payment of the income-tax for him by the plaintiff, is, like any other case of legal necessity, a mixed question of law and fact. It is hard to see that

Benefit, a mixed question of law and fact.

the actual receipt of the income from the dealings should always be considered as the sole criterion in a case like the Madras decision cited above. If the future receipt of the income by the defendant is as certain as received, it would be hardly fair to dismiss the plaintiff's claim without a trial of that question. In a similar case decided in Calcutta,<sup>2</sup> the payment of putni revenue by the plaintiff was held to

1. Raghavan v. Alamelu, 31 Mad., 35.

2. Krishno Kamini v. Gopi Mohun, 15 Cal, 652.

afford a good cause of action for a claim for refund against the recorded putnidars. Though the point was not precisely decided in that case, yet we find the principle for the decision of such matters has been clearly and elaborately pointed out by Mukerjee and Carnduff, JJ. in 1909.<sup>1</sup> In that case also, the concurrent findings of the Courts below dismissing the plaintiffs claim were discharged by the High Court and the case was remanded for fresh trial by the light of the remarks made

by the learned Judges. The High Court did not treat the concurrent findings as a final decision of a pure question of fact. Treating it as a mixed question of fact and of law, it was indicated that each item of supply made by the trader directly to the minor should be considered on its merits whether it was a necessary supply to the minor suited to his position in life. It mattered not, said the learned Judges, that there was a manager to the estate who was not the contracting party for the purchases of the articles for the minor's wedding both before and after his marriage.<sup>2</sup> The summary disposal of the matter by the Courts below that the materials as a whole were not needed, or could not be necessary for the minor by his own choice or selection, was not considered a right principle for decision. In such cases, it is the minor's estate and not his person, that is liable for the claim. This has been pointed out in a decision by the Judicial Commissioner at Nagpur.<sup>3</sup> In that case the personal decree against the minor was amended by a decree against his estate. A very important principle of law has been laid down by Mr Stanley Ismay in the decision of the aforesaid case. It has been pointed out, that the disabling provisions of law in the Court of Wards Act, Guardians' Act etc. do not exclude the quasi-contractual relationship created by necessary supplies to minors provided for in sections 68 and 70 of the Contract Act. But with all humility to that learned Judge, I fail to appreciate how the supply of sweetmeats worth Rs. 600 could be considered as necessities to the minor to render his estate liable without, as the report shows, any evidence being adduced by the plaintiff. Applying the tests of inquiry propounded in the recent decision of

1. *Jagon Ram v. Mahadeo Prosad*, 36 Cal. 768.

2. *Juggessur v. Nilumbur*, 3 W. R., 217. *Makundi v. Saratsukh*, 6 All., 417.

3. *Raja Raghoji v. Tikaram*, 17 C. P. L. R. p. 57.

Calcutta, noted above, it could perhaps be shown that the consumption of about 1200 to 1500 seers of sweetmeats at the rate of as much as even one seer a day would take from 3 to 4 years, for a minor to bring it under the category of necessary supplies. Feeding his friends and companions is as much outside the range of necessary supply as it is to furnish rich dainties and luxurious garments to a juvenile undergraduate boarder at the Oxford or Cambridge University. In that view of the matter, it is submitted, the Nagpur case was a fit one for remand to the first Court for its decision on merits with onus on the plaintiff.

A trespasser or an intermeddler has no cause of action to demand the refund of his expenditure, albeit the said expenditure benefitted the defendant. A widow was dispossessed of her inheritance by the divided brother of her deceased husband. The latter paid the Government revenue and was next dispossessed of the estate by the widow.<sup>1</sup> It

Trespassers and intermeddlers not entitled to refund.

was held that she was not bound to refund to her brother-in-law the revenue paid by him for the estate. But on the other hand, it has been ruled that if the widow had sued the trespasser to recover the mesne profits of the estate during the time of her dispossession, the revenue paid by the defendant could be claimed by him as a legal set-off. It is so because by mesne profits is meant the nett realizable income which the rightful owner would have himself derived.

On the subject of guardianship for marriage of minors, and of the legal necessity to provide for the expenses of such marriage, there are, barring one isolated decision<sup>2</sup> of the Madras High Court, a series of concurrent rulings of Courts, affirming the view that succes-

Guardianship for marriage of minors, and the expenses therefor.

sive grades of guardians can, in the absence of or for reasons of culpable negligence of the more preferable guardian or guardians, arrange for or effect a suitable marriage for a minor. A very important early ruling<sup>3</sup> upon the subject has laid down that the validity of such a marriage depends on the concurrence of all the adult and recognized

1. *Tilak Chand v. Saudamini*, 4 Cal., 566. *Binda v. Bhonda*, 7 All., 660.

2. *Sundari v. Subramanya*, 26 Mad., 505.

3. *Nannaveyam v. Annammal*, 4 M. H. C. R., 339.

guardians of a minor. Bare silence or capricious objections do not of course deserve consideration. But the main principle stated in the case is that none of the legal guardians, near or remote, in the scale of successive guardians can demand, as a matter of right, a declaration or an injunction relating to a prospective marriage in favour of his exclusive right to marry the girl and to secure an order for the expenses therefor. In that case, the divided uncle of the girl brought a suit of that description against the girl's mother who was the custodian of the minor's estate and person. The claim was rejected throughout. It cannot however be at all deduced from this ruling, that the legal guardian in charge of a minor, in every way eligible for marriage, cannot be compelled to marry her and to reject reasonable proposals therefor. In the recent decision of Madras quoted above, it is extremely difficult to follow the principle alleged to be deduced from the aforesaid early decision of the same High Court, that the father is under no legal obligation to marry his daughter. It is impossible to deduce such a conclusion from the earlier case. On the contrary we find it laid down that "if on a choice being made of a person in every way suitable to be affianced, a mother without sufficient cause improperly refused to accept him and obstructed the betrothal, a suit to compel her to allow the ceremony to take place, and, if she was chargeable, to provide means for its celebration, would probably be successful." Mr. J. D. Mayne who was himself concerned in the earlier case does not notice in the seventh edition of his *Hindu Law and Usage* the recent decision of the Madras case cited above. But we find in Babu G. C. Shastri's *Hindu Law*, 3rd edition, page 107, his expression of disapproval of the view of the Madras case.

It is not always the case, that the preferable *de jure* guardian is necessarily the *de facto* guardian. Take for instance, the case of the *Kulin* Brahmins of Lower Bengal. The families of these Brahmins were at one time numerous and widely scattered all over that province: but their generations and their distinctive feature of *Kulinism* went on fast disappearing during the course of the second half of the last century. The *Kulin* Brahmins enjoyed the obnoxious privilege of marrying numerous wives, and considered it a point of honour that their daughters were never married to non-

*Kulin* Brahmins. They were an itinerant class of people, and their offspring were under the constant guardianship of their wives and their wives' parents. An early decision<sup>1</sup> of Calcutta held that for the purposes of the marriage of a *Kulin* Brahmin's daughter her mother, not her father, has the preferable disposing power for the girl's marriage. An attempt to set aside the marriage of a girl effected by her mother failed on the ground of *factum valet*.<sup>2</sup> A similar instance<sup>3</sup> of a father's neglecting the marriage of his daughter occurred in Bombay. It is needless for my purpose to prosecute this aspect of the question; and I shall presently revert to the consideration of marriage expenses as a branch of legal necessity and claimable by a party entitled to marry, against an adverse party on whom the obligation lay to marry the girl. A case of the Tinnevely District of the Madras Presidency came up on two occasions before the High Court.<sup>4</sup> In the earlier case the mother of the minor girl having incurred the necessary marriage expenses of her daughter recovered the same from the undivided brother of her deceased husband. In the later case, the same plaintiff incurred the expenses of the *gowna* ceremony of her married girl which were necessary and customary among the Hindus for the formal departure of the married girl for her settlement with her husband. In both the aforesaid cases it was held that as the plaintiff was interested to incur the expenditures, and as Hindu Law cast upon the defendant the obligation to provide for the same, the claims were decreed under the provisions of section 69 of the Contract Act. It has been ruled that the bare absence of the formal consent of the preferable guardian does not vitiate the marriage, provided it is performed without any force or fraud and with due religious ceremonies.<sup>5</sup>

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1. *Modhoosoodun v. Jadub*, 3 W. R., 194 (Civil).

2. *Bai Diwali v. Moti Karson*, 22 Bom. 509. *Mulchand v. Bhudhia*, 22 Bom., 812. *Misrilalsa v. Harialsa*, 15 C. P. L. R. 46.

3. *Khushalchand v. Bai Mani*, 11 Bom. 247.

4. *Vaikuntam v. Kallapiran*, 23 Mad. 512. *Vaikuntam v. Kallapiran*, 26 Mad. 497.

5. *Venkatcharyalu v. Rangacharyalu*, 14 Mad. 316. *Brindabun v. Chundra*, 12 Cal. 143.



There is ample authority for the proposition that provision for the maintenance of the minors in the family are obligatory on the holder of the estate.<sup>1</sup> It appears also that the obligation is coextensive in respect of the marriages of the same minors. Indeed maintenance and marriage are obligations of legal necessity which entail a charge on the family property. In the Allahabad case just cited, the widow and her minor daughters got a decree against the widow's step-son who neglected to provide for those necessary charges. The amount required for maintenance or for marriage expenses is a question of fact regulated by the status and the social standing of the parties concerned.

In a recent decision passed by the High Court of Allahabad<sup>2</sup> the *de facto* guardians and protectors of a lunatic's property. Aliena- Muhammadan, being his wife and mother, sold the lunatic's land in order to pay his debts. It was found as a fact that the transaction was for the benefit of the lunatic. The learned Judges of Allahabad treated the matter as if it was an alienation of a Muhammadan minor's estate by his mother as his *de facto* guardian. The conflict of views on the subject of a Muhammadan mother being no guardian of her minor son under the *Koran* has been noticed in the preceding pages. These discrepancies prevailed in many early rulings of Courts. They need not be noticed here. Suffice it to say, that the Allahabad Court relied on some of the recent decisions and ruled that the transaction should be upheld.<sup>3</sup>

Besides the aforesaid rulings of Courts recently passed, quoted above, we have an interesting judgment of the Madras<sup>4</sup> High Court on the subject of a minor's liability, based on a contract executed by his mother as guardian, for an antecedent debt due by the minor's father. The said contract was a bond executed in the name of the minor as the obligor by his mother. The suit was instituted against the minor with his mother as his *guardian ad litem*.

Minor's liability for antecedent debt.

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1. *Tulsha v. Gopal Rai*, 6 All. 632.
  2. *Ummi Begam v. Kesho Das*, 30 All. 462.
  3. *Mafazzal v. Basido Sheikh*, 34 Cal., 36. *Ram Charan v. Anukul*, 34 Cal., 65. *Majidan v. Ram Narain*, 26 All., 22.
  4. *Duraisami v. Muthial*, 31 Mad., 458.

She admitted the claim; but both the Courts below dismissed the suit, apparently on the ground that the minor was not liable for the debt, the guardian's admission notwithstanding. The High Court on revision pointed out, that it was irregular on the part of the Courts below to have thrown out the claim without a contest by a more properly constituted *guardian ad litem*. For this reason, the plaintiff's revision petition was not heard by the Court without a new appointment of a *guardian ad litem* who actually contested the plaintiff's claim for the first time in the High Court. It was thus held that the claim was properly framed for its trial on merits, and the suit was remanded for its decision on the basis of the legal liability of the minor for an antecedent proper debt on the lines of a previous decision<sup>1</sup> of the same High Court. This recent ruling of Madras throws an important side light to indicate what should be the Court's procedure, ordinarily speaking, when a liability is sought to be saddled directly against a minor. It would seem to follow from the ruling that if the *guardian ad litem* of the plaintiff's selection admits the claim off-hand, and it appears to the Court that the liability should not be imposed on the minor without a fair

Necessity for appointment of a new *guardian ad litem*

trial, the Court should stay its hand, direct the claimant to appoint a new *guardian ad litem* with a necessary affidavit therefor, and then proceed with the trial of the case on its merits.

The law relating to the appointment, removal, and substitution of guardians and managers for minors, lunatics, and other incapable persons is contained in legislative enactments in force in the country from time to time. The consolidated Acts now in vogue have focussed the general and important principles, which have been laid down in the decisions of cases, passed within 40 years from 1850. In other words, The Guardian and Wards Act, VIII of 1890, contains exhaustive provisions of law regulating the relations between guardians and wards and providing ample safeguards for the benefit and for the legal necessities of the minors. The general principles of this enactment are applicable to the cases of lunatics and other incapable persons. But besides the special classes of Courts which are privileged to deal with the minors and their

1. Subramaniya v. Arumuga, 26 Mad., 330.

estates under the special legislation on the subject, every Civil and Revenue Court is vested with plenary powers,—I mean discretionary jurisdiction, to protect the interests of minors and their legal necessities in litigations in which they are concerned as parties. Under the code, we have the guardian for the plaintiff minor styled as his next friend, and the guardian for the defendant minor as the guardian *ad litem*. The Code of Civil Procedure contains ample provisions for the adjudication of disputes in which the minors and their estates are involved or are concerned. We have just seen in

Civ. P. Code, Ss.  
446 and 458—Order 32  
Rules 9 and 11 of Act  
V of 1908.

the recent Madras decision quoted above that by virtue of the inherent power which the Courts representing the sovereign possess, the guardians for the plaintiffs or for the defendants holding their respective offices in the Courts of law are removable by the Courts seized with the cases, if the interest of the minors justify their removal. In that case, substitutions of new guardians become necessary in compliance with the adjective law of procedure. There is a noticeable distinction in this respect between the guardian for the plaintiff and the guardian for the defendant. The law under the old code has apparently been left unaltered under the new code of 1908. It follows from the wordings of the rules that whereas in the case of a guardian for the plaintiff the Court can direct the removal of the next friend on the application of a new guardian, holding certificate or not, a guardian *ad litem*, can, if the justice of the case requires it, be removed by the Courts *suo motu*. In one case<sup>1</sup> a *Kabuliat* was forced upon a minor behind his back, and in spite of the repudiation of guardianship by the proper guardian on record. Needless to say, that the document entailed a pecuniary liability on the minor which was not legally necessary. The real guardian successfully found an entrance into the decided case by reopening it with an application. Whether this was the correct procedure to follow, I need not stop to inquire. Recent rulings, quoted in the early part of this Chapter seem to show that the remedy sought by the real guardian is only available by the institution of a suit to avoid the decree on the ground that the minor was not represented in the previous action. It has been

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1. *Sheoburutt v. Laljee*, 13 W. R., 202.

held<sup>1</sup> that the bare infringement of the rule of procedure regarding sanction for the alienation of minor's property

Removal of guardian  
when necessary for a  
minor's interests.

by the certificated guardian is *ipso facto* no ground for removing him from guardianship.

But on the other hand a guardian, in whose favour a certificate of guardianship had been ordered but not issued, had his certificate recalled for his improper dealings with the minor's estate.<sup>2</sup>

It has, however been pointed out "that the proper course for a friend of an infant to pursue where a person not appointed as guardian by the Court is managing improperly the infant's estate, or is not making proper provision for his education, is to bring on behalf of the infant a regular suit against such guardian, and on cause shown, the Court trying such suit would interfere by injunction to restrain such guardian from intermeddling with the estate or custody of the infant."<sup>3</sup> Thus then, we find it laid down in an early decision<sup>4</sup> of Calcutta that where charges of immorality were brought against the holder of a certificate under Act XL of 1858, it was held to be the duty of the Judge to enquire into the truth of the charges and fitness of the certificate holder. It would appear, therefore that where the benefit to the minor is in risk, or a suspicion of that nature arises, the Court should secure a proper representation for the minor in the litigation to avoid the charge of irregularity in the proceedings, and to make the final decision in the case as binding and operative.

In an important case which went up to the Privy Council from the district of Bhagalpur<sup>5</sup> in Bengal, the minors instituted a suit to obtain their freedom from liability as against an *ex parte* decree which had been obtained against them and their uncle on a mortgage deed which a predeceased uncle of the minors had executed in favour of the mortgagee for certain debts. The original mortgagor was a junior brother of the three *viz.* the plaintiff's

1. Brijendro v. Bussunt, 13 W. R. 300.

2. Tusueef v. Bibee, 14 W. R. 453.

3. Trevelyan on Minors, p. 185.

4. Mohunudy Begum v. Oomdutunisa, 13 W. R. 454.

5. Durga v. Kesho, 8 Cal, 656 (P. C.)=11 C. L. R., 210 (P. C.)

father, the second brother who was actually sued with the minors apparently as their guardian in the action, and the mortgagor himself. On the death of the plaintiff's father and his brother the mortgagor there were certain internal disagreements in the family which resulted in the minors' mother's obtaining a certificate of guardianship for the person and property of her minor sons. This

Married woman can be guardian of minor's estate.

she apparently did to protect the interests of her children at a time when on account of decrees and debts on all sides the family properties were being seized and lost. But under

the principles of Hindu Law, as the family was joint, the guardianship certificate of the mother in respect of the undivided interest of the minors could not be granted,—the family being governed by the Mitakshara<sup>1</sup> School of Hindu Law. The High Court restricted the scope of the certificate to the personal protection of the minors. Thereafter, the aforesaid mortgagee brought an action against the family manager, the minor's uncle, and the minors were impleaded under his guardianship, the mortgagor having died in the meanwhile. The minor's mother was not allowed to represent her sons as their guardian *ad litem*. An *ex parte* decree was obtained, after which the minors instituted the suit claiming exoneration of their interest in the estate

Manager of the family not necessarily the guardian of minor coparceners. Legal necessity.

from the decree. In this they succeeded up to the Privy Council, on the sole ground that the manager of the estate was not necessarily a competent guardian in the suit to represent the

minors in order to bind them. During the course of nearly 30 years that the old Civil Procedure Code was in force, there was a provision in the law (section 457) which incapacitated any married woman from being nominated as the guardian *ad litem*. The present code (Act V of 1908, Order 32, rule 4) has withdrawn this disqualification. But under the old Code a Bench of the Allahabad<sup>2</sup> High Court have, following the aforesaid Privy Council case, held that the minor sons of a debtor are not liable under a decree passed against them in a suit in which they were sued with their father under the guardianship of their mother. Curiously enough, the father refused to represent his sons as their

1. Baboo Sheonandan v. Mt. Ghunsham, 17 W. R., 237.

2. Sham Lal v. Ghasita, 23 All., 459.

guardian *ad litem*. Why he played that trick the report does not show ; but apparently his trick bore the intended fruit which the most strange provision of law that was contained in the old Civil Procedure Code (s. 457), he hoped, would secure for his sons. I call it a strange provision of law because ordinarily it is impossible to conceive that in a family of minor children of a single deceased male owner of properties, no one can better represent the interests of the minors than their widow mother. The withdrawal of the clause from the present code is ample justification for my remark. Be that as it may, the Allahabad Court in the case just cited passed in favour of the minor plaintiffs, an unconditional decree of freedom from liability to the extent of two-thirds share of the ancestral estate to which they were entitled under the Mitakshara. But I do not clearly see how in view of the Privy Council decision before the learned Judges, the equities in favour of the decree-holder defendant, could be over-looked, when it is stated that there was no kind of fraud in the case, and the illegal and immoral nature of the father's debt was not set up as a part of the plaintiff's claim. In both the aforesaid cases, *viz.* of Allahabad and of the Privy Council, the sole ground set up was the irregularity of the adjective procedure of non-representation of the minor in the suits in which the decrees had been passed. In the latter case it is quite clear that their Lordships of the Judicial Committee held that in a family of internal dissensions, the uncle could not be permitted successfully to pose as the minor's guardian after securing as a result of a contentions proceeding the removal of the mother's name from the record as her son's guardian. Hence it is intelligible that the minors were not bound by the decree that had been passed *ex parte* against them. But at the same time their Lordships indicated that the successful minor plaintiffs were bound to render the equity to the decree-holder in proportion to their father's debt which was included in the mortgage deed by their amateur uncle-guardian. But what can be said in justification of the aforesaid Allahabad case if it be held to be the sound Hindu Law that the mortgagee was entitled to bring to sale the whole of the ancestral property secured by the deed, even if the father were alone impleaded in the suit. The technical ground of the minor's suit should have resulted in a technical declaration that the plaintiffs were not bound by the decree in a suit in which they were not represented. But to say that their interest to the extent

of  $\frac{3}{4}$ ths of the ancestral estate was not liable for the debt which the decree represented is, I apprehend, repugnant to the well-settled principles of Hindu Law which regulate the liability of sons for their father's debt. Under the present Civil Procedure Code (Act V of 1908) such a suit could not, it is submitted, be instituted.

Bare nonrepresentation of the minor or of the lunatic in the previous suit which culminated in decree or in execution sale will not *per se* warrant the reversal of the proceedings or the auction sale, solely because the minor or the lunatic was not legally represented in the litigation. This fact may lead to the conclusion that the decree is not binding against him; but the result of the decree may yet bind him on the merits of the case. This has been decided in a Bombay<sup>1</sup> case. This decision followed the aforesaid Privy Council case in holding that the original debt which was the foundation of the decree and of the execution sale was of legal necessity and binding on the minor. Hence on the merits of the case the plaintiff's claim was not allowed to succeed, though on technical grounds of procedure he was not properly represented in the suit in 1869. But even in this respect, I entertain grave doubts. We have not the details of the Bombay case, just cited, before us. We cannot say whether the Court did or did not appoint some body as the guardian-*ad-litem* for the minor Parbhu in the mortgagee's suit in 1869. If there had been such an appointment, it is doubtful, independently of the provisions of Act XX of 1864 (Bombay), whether it could be said that the minor was not properly represented in the litigation. In the generality of instances permission to defend may be implied; and if essentially the debt be one of legal necessity, the decree and sale cannot subsequently be revoked.<sup>2</sup> Remembering the fact that in respect of joint family properties under the Mitakshara School of Hindu Law a certificate of guardianship for the interest of a minor coparcener cannot be obtained,<sup>3</sup> we must look for the express or the implied appointment of the next<sup>4</sup> friend or the guardian *ad litem* to validate the proceedings against the minor.

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1. *Daji v. Dhiraj*, 12 Bom., 18.

2. *Jogi Singh v. Kunj Behari*, 11 Cal., 509.

3. *Shamkuar v. Mohanunda*, 19 Cal., 301. *Virupaksháppá v. Nilgángavá*, 19 Bom., 309.

4. *Narsingráv v. Venkájí*, 8 Bom., 395.

We have it in the Legal Practitioner's Act, a provision of law to the effect that an agreement to remunerate the lawyer for past or future services must be in writing and filed in the Court concerned in the case; and the said agreement must be fair and reasonable. In a case<sup>1</sup> decided by the High Court of Madras, the maternal uncle of a minor engaged a pleader to conduct criminal cases for him and executed a promissory note for Rs. 600 on the basis of an oral agreement. The case was dismissed in the Court below, *first* on the ground of the provision of law cited above, and *next* because it was held the prosecutions were not necessary for the benefit of the minor. The High Court, while concurring in the latter finding, passed the following remark with respect to the law on the subject, that want of written agreement was no bar to a decree being passed for such reasonable remuneration as may be found on the principle of *quantum meruit*.

In a foregoing Chapter, I have dwelt at length on the binding nature of the debt, obligation, and charge, incurred or created by the father or the managing coparcener of a united family owning joint or ancestral estate. In such a coparcenary, the members are either adults or minors. The rule of law and equity in respect of the legal necessity of a transaction has no respect for age. We have noticed the early discrepant views of the High Courts of India brought about mainly by the provisions of Ss. 85 and 91 of the Transfer of Property Act, on the subject of the coparcener's (minor or adult) claim to recover his share, or to redeem the whole estate against an antecedent mortgage effected by the managing members. But all these discrepancies must be deemed to have been silenced by two leading Privy Council decisions.<sup>2</sup> In the latter judgment, their Lordships have gone farther and laid down that there could be no distinction, in principle, between a private sale and a sale brought about under the pressure of execution proceedings. This view of the law has been well

Lawyer's remuneration : Legal necessity.  
Minor's claim qua joint property : Legal necessity

1. Sundararaja v. Pattanathusami, 17 Mad., 306.  
2. Daulat Ram v. Mehr Chand, 15 Cal., 70 (P.C.) Nanomi Babuasin v. Madan Mohan, 13 Cal., 21 (P.C.): L. R., 13 I. A., 1



expressed in an important decision passed by the Judicial Commissioner at Nagpur.<sup>1</sup> In that case a posthumous minor son of a deceased owner of a village sought to redeem a mortgage of the property which had been foreclosed about 5 years after his birth in a suit brought by the mortgagee against his mother and his elder brother. The debt was one of legal necessity. Indeed it was an antecedent debt which was due by the deceased father of the minor plaintiff. No question as regards the binding nature of the debt was raised in the pleadings. But the sole ground of action was the technical informality that the minor plaintiff had not been impleaded in the previous action. It is strange that though a plea of this sort finds, at times, favour in some of the recent decisions of Courts,—*vide*, for instance, the two recent Nagpur cases noticed at page 321 *ante*,—we must regard it a settled question that unless the minor or the adult claimant raises in his new suit for redemption or for the recovery of his interest in the estate, the fundamental question that the legal necessity for the transaction was wholly or partially wanting, he is entitled to no kind of relief in defeasance of the finality of the previous transaction of sale or of foreclosure.

I will now turn to a different subject ; and that is the question of succession of outcaste and apostate guardians in relation to the estates of minors. Serious conflicts exist in the case-law on the subject.

The anomalies and inconsistencies have all along arisen out of legislative enactments which became necessary under the exigencies of altered times. These provisions of law will be considered along with the cases of legal necessities and obligations connected with the estates of outcastes, apostates, and remarried widows. The first important case that should be noticed is one decided by the High Court of Allahabad.<sup>2</sup> In that case, it has been held that Act XXI of 1850 does not apply only to a person who has renounced his religion or been excluded from the communion of caste. The successful plaintiff in this case was the son of a Hindu convert to Muhammadanism. The latter was the youngest Hindu son, and one of three Hindu brothers. The widow of a

1 Pandit Gopal Rao v. Gangay, 2 C. P. L. R., 221.

2 Bhagwant v. Kallu, 11 All., 100.

deceased brother had made an alienation in this case. On the death of the said widow, the plaintiff claimed the estate from the alienee and succeeded in all the Courts. No question of legal necessity was involved in the case; but the principle of the ruling goes to show that a son by birth a Muhammadan and born after the conversion of his father to Muhammadanism can as a rever-

Right of apostates and out-castes in alienations without legal necessity.

sioner challenge the improper dealings of a Hindu widow of the original family. However shocking and revolutionary this ruling may appear to the traditions and instincts of the Hindu race, the remarks of Edge, C. J. are significant that no impressive or sentimental argument based on the archaic view of the Hindu Law could induce the judges to ignore the plain meaning of the Legislature. The decision under notice is of a comparatively recent date; and we shall presently see how far the view of law given in this judgment has been accepted or followed in other relations of family life. Mr. Mayne in his Seventh Edition of Hindu Law remarks at page 806 top, "Even with the aid of the statute it seems difficult to see how a purely personal law, such as the Hindu or Muhammadan Law, can be applied in favour of a person who has renounced it." Babu Golap Chunder Shastri in his Third Edition of the Hindu Law is more indignant over the result of the Allahabad decision cited above. "Is it," says the learned author at page 328, "at all conformable to the principles of justice, equity, and good conscience to hold that the son born to a person after he had renounced Hinduism and become a Muhammadan or a Christian is entitled to be the heir of that person's Hindu brother or other relations, when it is a notorious fact that they become totally excommunicated and estranged, and are no longer recognized as relations by Hindus; for it cannot but be admitted, that inheritance is founded upon principles of natural love and affection, and no Court of equity can hold the principle applicable to persons who are practically perfect strangers to each other." But in spite of the criticisms of these two learned authors, we have in a recent decision of the High Court of Calcutta,<sup>1</sup> an indirect approval of the principle laid down in the Allahabad case. The claim of the plaintiff was disallowed not on the ground of her change of religion, but because she was guilty of an aggravated form of incontinence

1. *Sundari vs. Pitambari*, 32 Cal. 871=9 C. W. N. 1003.

*i.e.* change of religion coupled with unchastity. The woman while her Hindu husband was alive married a Muhammadan and begot children by him.

In two comparatively recent decisions of the High Court of Allahabad,<sup>1</sup> the learned Judges have carefully considered the legal consequences of apostacy of a member of a Joint Hindu family in respect of his rights or interests in the united estate. The cases in both the reports arose out of the contentions of a rich Hindu family in the United Provinces governed by the Mitakshara law. In both the cases the claims were successfully put forward by the male Hindu reversioners of the family to set aside alienations which had been effected by the daughters of the last male owner without any legal necessity. The first case related to the estate which belonged to the family; while the second and the later case of 1907 related to the estate which was claimed by the heirs of the Muhammadan convert who embraced Islamism in 1845. This convert was the father and the head of the united family of considerable properties. His name was Raja Ratan Singh. He survived his only son Doulat Singh who remained a Hindu, only a few months after the latter's death in 1851. I say at once that if in the opinion of the learned Judges of Allahabad, the ruling contained in I. L. R. 11 Allahabad, page 100 was sound, and if it could be said that the Hindu Law was abrogated by Act XXI of 1850, then the father Ratan Singh was entitled to the whole estate by right of survivorship upon the death of his son Doulat Singh. But whatever might have been the wording or the expressions used by the same Judges in the earlier case, noted above, we have the authority of the same learned Judges that they did not mean to lay down the supersession of the fundamental Hindu Law as to the consequences of apostacy. The learned Judges say:—"In our judgment in the previous case we (at pp. 570 *et seq.* of the report) fully discussed the meaning and effect of Regulation No. VII of 1832, and held that it did not abrogate the Hindu Law as to the consequences of apostacy." This being settled

Act XXI of 1850 does not abrogate Hindu Law. the remainder of both the cases is very easy to understand. In the first case the daughter's sons of Daulat Singh recovered the estate

1. Govind Krishna *vs.* Abdul, 25 All., 546. Govind Krishna *vs.* Khunnilal, 29 All., 487.

alienated by their mother and aunt without any legal necessity after the death of the surviving lady in 1899. In the latter case, the legal consequences of apostasy were directly involved and it was held that the Muhammadan convert's reversioners (daughter's son) Khairati Lal could claim no interest in any part of the property by right of inheritance from his maternal grand-father Ratan Singh, the Muhammadan convert. It may be that this point was not directly discussed in the manner in which I venture to state it. But the practical result of this litigation cannot, I think, be otherwise. Because we have it in the case a fair compromise between the rival claimants, i.e., the reversioners of the Hindu son and of the convert father made in 1860. This

Compromise or arbitration and decree thereon not valid without legal necessity. compromise apparently recognized the existence of the convert ancestor's claim to a share in the estate. The learned Judges of Allahabad have held this to be a proper compromise, for the time being, for the settlement of a doubtful claim. If the claim of the convert's reversioner Khairati Lal was considered doubtful by the learned Judges in 1907, it is a question, if his claim was considered at all doubtful in 1860, in view of the law laid down in Act XXI of 1850 as explained later on in *L. L. R.* 11 Allahabad, page 100. However that be, the High Court in the later decision viewed the compromise of 1860 effected in the interests of the two then minor daughters by their guardians, in the light of an improper alienation of property beyond their power as limited estate-holders. A number of rulings<sup>1</sup> of Courts, including a decision of the Privy Council, was quoted in the judgment in support of the argument that a decree or order founded on a compromise, or even an arbitration award based on reference, must be held to be an alienation of property, if the said compromise or reference be made by a lady with limited rights. But the want of legal necessity must depend on the fact that not only had the ladies not the power to effect the alienation by compromise or by arbitration reference, but essentially the transaction must be such as not to justify the alienation for any valid and necessary purpose.

1. *Inrit Konwar vs. Roop Narain*, 6 C. L. R., 76 at p. 81. *Sheo Narain vs. Khurgo Koerry*, 10 C. L. R., 337 at p. 342. *Jeram Laljee vs. Veerabai*, 5 Bom. L. R., 885. *Sant Kumar vs. Deo Saran*, 8 Cal., 365. *Ram Sarup vs. Ram Dei*, 29 All., 239.

Turning our attention to a Hindu widow who may be the guardian of her minor son, or the widow in possession and enjoyment of her heritage, and who may at the same time be the daughter of a sonless father, the question of her succession, her reversionary interest and her right of guardianship, are involved in serious conflicts and anomalous views of Courts mainly due to what I may fairly call the un-Hindu legislation on the subject by Act XV of 1856. The revolutionary provisions of that law are well illustrated by certain current decisions of Courts. In the earliest case<sup>1</sup> on the subject, the widow mother while admittedly she was the *de facto* and *de jure* guardian and manager of her children, a son and a daughter by her first husband, remarried as a widow, and thus necessarily left control of the estate and ceased to have any connection with her late husband's family. After her remarriage, the son died. It was held that the widow

Widow Remarriage  
Act—XV of 1856.

was entitled to succeed to the estate of her son by the former marriage. The decision of the learned Chief Justice Sir B. Peacock goes to show that the disabling section 2 of the Act did not deprive a Hindu widow, upon her remarriage, of any right or interest which she had not at the time of remarriage. In other words, she would be only divested of that interest in the estate of her deceased husband and of his lineal successors, which had accrued prior to or at the time of her remarriage; but not that interest which would accrue to her, as widow, or as daughter, that would accrue after remarriage. Is this not a strange and an *un-Hindu* legislation? In a case<sup>2</sup> decided by the Judicial Commissioner at Nagpur, the aforesaid ruling of the High Court of Calcutta has been followed.<sup>3</sup> The High Court of Bombay has placed the same construction on sections 2 and 5 of Act XV of 1856 in *Chamar Haru v. Kashi*, I. L. R. 26 Bom., 388. A little less than half a century has elapsed; and we are now bound to admit, that this interpretation of the Hindu Widow Remarriage Act as the standing law of the land is as outrageous and repugnant to the feelings of the Hindu races in India, as it was considered to be by one of Judges in the earliest decision quoted above. The remarks of L. S. Jackson, J. are yet quoted with approval by the

1 *Akorah v. Boreanee*, 11 W. R. 82. 2 B. L. R., A. C. 198.

2 *Sadhu v. Mt Patango*, 16 C. P. L. R., 99 (1903).

3. See also *Sammar v. Mt. Bhago*, 5 C. P. L. R., 83.

current Hindu Law commentators of this country. The remarks are :—  
 “The words of section 2 are somewhat embarrassing, and the impression left on my mind is that the Legislature had an intention which it had failed to carry out in words. I can hardly suppose that the Legislature intended a Hindu widow to be capable of inheriting the property of her son, she having previously remarried, when, if she had remarried while in the enjoyment of such property, she would have been by such remarriage entirely divested of that property. For, although it is true that if the son had been living at the time of her remarriage, in certain circumstances, he would have had the option of depriving her of the succession or conferring it on her, still it might, and probably would in most instances, happen that at the time of remarriage the son was an infant. But it is not our province to set aside the clear meaning of the words of the Legislature merely for the purpose of getting rid of apparent inconsistencies.”<sup>1</sup> In the Full Bench case of the High Court of Bombay, the widow and remarried mother was held to be not entitled to the estate of her son who had died before her remarriage.<sup>2</sup> It should however be remembered that the remarks of Ranade, J. at page 331 that the absolute interests she acquires as heir to other relatives are expressly preserved to her by section 5 of the Act, except so far as section 4 limits this right, are confined to the law prevailing in the Bombay Presidency. Because the other relations referred to by the learned Judge are those of her father's side, in which case, according to Bombay School, the remarried widow acquires as daughter or sister an absolute interest in the property. For the rest of India even under Act XV of 1856, the remarried widow would in respect of the estates of all kinds of relations acquire only the qualified estate of a Hindu widow subject to the restrictions of legal necessity.

Restricted estate of remarried widow except in Bombay, in certain cases.

Such a remarried widow loses her right of guardianship over her minor children by the first marriage. This is borne out by the custom in the country, and it is also settled by authorities.<sup>3</sup> Indeed the uni-

<sup>1</sup> Lakshman v. Shiva, 28 Mad., 425,

<sup>2</sup> Vithu v. Govinda, 22 Bom., 321. (F.B.)

<sup>3</sup> Mayne on Hindu Law, 7th Edition, para. 211, and Khushali v. Rani, 4 All. 195.

Remarried widow loses guardianship and right of maintenance. versal custom of the country and the common belief of the people are in favour of the view that a woman remarrying by custom, or under the privileges afforded by Act XV of 1856, does not as a matter of practice claim by succession any property of a deceased male belonging to the family of her late husband, even if the devolution were to occur after her remarriage. I am surprised to read a passage at page 269 of Dr. Gurudas Banerjee's Tagore Law Lectures, 1879 on Marriage and Stridhan. The passage runs thus :—"In the third place, the widow's right as regards her share of her late husband's estate on partition among her sons, not coming within the scope of section 2, would not it seems, be affected by her remarriage." It seems difficult to follow the principle laid down by the learned author. Because as section 2 of Act XV of 1856 deprives the remarrying Hindu widow of her right to claim maintenance at the time of her remarriage, the very foundation for her claim to a share at the partition of their joint estate which is based on her right to maintenance, is withdrawn from her by the express wording of the section : and the allotment of a share to the mother at the time of the partition among her sons is meant not to represent a portion of her heritage, but is a provision by way of her maintenance.

On the subject of maintenance awarded to or claimable by Hindu wives and widows, a recent decision of the High Court of Allahabad<sup>1</sup> notices a strong division of opinions of the High Courts of India as to the operation of section 2 of Act XV of 1856. In the case just cited the learned Judges of Allahabad have thought it expedient to adhere to the course of decisions of the United Provinces in preference to the current of unanimous rulings of the other High Courts of India. The rulings ranged below represent the *cursus curiæ*<sup>2</sup> of the Allahabad Court on the one hand and that of Calcutta, Bombay and Madras on the other. The woman Kaunsilla obtained in 1881, as the wording of the decree shows, a perpetual monthly maintenance decree at the rate of Rs. 5 per month with a charge on her husband's property. After

1. Gajadhar *vs.* Kaunsilla, 31 All., 161.

2. Harsaran Das *vs.* Nandi, 11 All., 330. Dharam Das *vs.* Nand Lal Singh, A. W. N. (1889) 78. Ranjit *vs.* Radha Rani, 20 All., 476. Matungini *vs.* Ram Rutton, 19 Cal., 289. Rasul Jehan *vs.* Ramsarun, 22 Cal., 589.

the death of her husband, she remarried in 1905. The maintenance allowance which had been regularly paid till her remarriage having been stopped, she brought a suit for the arrears of maintenance. The High Court on appeal granted a decree in her favour holding that the rule of *stare decisis* of the United Provinces precluded the Court from following the current of rulings of the other High Courts of India. I have no other remark on this subject to make than barely to observe that the view of Donnerjee, J. as expressed in the judgment should have induced the learned Judges to refer the matter for the decision of a Full Bench in order to see if a uniformity of decisions on the subject could be arrived at. That was desirable not only to remove the conflict, but the universality of the prevalent custom of the country demanded that the Courts of the United Provinces of India should not have continued the comedy of errors against the personal conviction of the Judge himself. Strangely enough it appears to me that throughout the course of the litigation in this case up to the High Court, it was not

No fresh suit in case of perpetual decree for maintenance

urged in defence that in the face of the decree as it stood, passed in September 1881, no fresh suit lay in view of the provisions of clause 47 of Act V of 1908. The full text of the decree is not clearly set forth in the report. But I will venture to presume that the relief claimed by Kaunsilla was for a decree for the monthly rate of Rs. 5 in future coupled with a claim for Rs. 150 as arrears. Such a combination of claims obviously fell within the purview of clauses 1 and 2 of Section 7 of the Court Fees Act. A decree embodying a claim under Clause 2 is a perpetual<sup>1</sup> command, and ever executable for 3 years' maintenance prior to the date of the application for execution. How such a plea could have been omitted in this case, I fail to understand. There is always a distinction between a claim for maintenance for the past as arrears and a claim for the establishment of a right for future maintenance in which the claimant can very properly and legitimately include all the past arrears due to him or her. These two classes of suits are apparently governed by two independent clauses of the Court

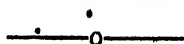
1. Mulji Bhai Shanker vs. Bai Ujam, 13 Bom., 218. Venkanna vs. Aitamma, 12 Mad., 183.



#### 490 THE LAW OF LEGAL NECESSITIES AND OBLIGATIONS.

**Fees Act.** The decree in one case is a pure money decree which is exhausted by its payment : while the decree in the other case is a perpetually executable decree for which no second suit should lie.

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